Simmons Industries, Inc. *and* United Food and Commercial Workers Union Local 340 and Plant Safety Committees and Total Quality Management Committees, Parties in Interest. Cases 17–CA–16850, 17–CA–17015, and 17–CA–17086

May 20, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On March 29, 1995, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent and the Charging Party each filed exceptions and a supporting brief. The Respondent filed a brief in reply to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.[4]

AMENDED CONCLUSIONS OF LAW[5]

Insert the following conclusions of law 4, 5, and 6 and renumber subsequent conclusions in the judge's decision accordingly.

''4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(2) and (1) of the Act by dominating, assisting, and supporting the Plant Safety Committees at its Jay, Oklahoma, and Southwest City, Missouri plants, and the Jay, Oklahoma plant Fast Food Committee.

5. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Interrogating employees about their union membership, activities, and sympathies of other employees.

(b) Telling employees that they can quit if they do not like its discriminatory denial of overtime.

(c) Telling employees that it would be futile for them to select United Food and Commercial Workers Union Local 340 or any other union as their bargaining representative and impliedly threatening them with unspecified reprisals if they select that or any other union as their bargaining representative.

(d) Creating an impression among employees that their union activities are under surveillance.

(e) Telling employees that a former employee would not be hired, in part because of union activities of the former employee's spouse.

(f) Threatening employees with violence by any of its supervisors or other agents if they engage in union activities.

(g) Selectively and disparately enforcing a rule regulating public access to its Jay, Oklahoma plant employee breakroom by prohibiting access to that breakroom by union representatives.

[1] There are no exceptions: to the judge's finding that the Respondent violated Sec. 8(a)(1) and (2) by dominating, interfering with, and assisting the Jay plant TQM/Fast Food Committee; to any of the judge's recommended dismissals of 8(a)(1) allegations; to the recommended dismissals of 8(a)(3) allegations concerning the disciplinary warnings to employees McKinley and Ward and the denial of the swing crew job to employee Rice; or to the recommended dismissal of 8(a)(2) allegations concerning the Jay Plant Corrective Action Team and the Southwest City plant ad hoc employee participation corrective action group.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by selectively and disparately prohibiting access of nonemployee union representatives to the Jay plant breakroom, we rely on the judge's findings that the Respondent permitted breakroom access to a wide range of for-profit and charitable entities. We need not pass on the judge's suggestion that access provided to food vendors, standing alone, is sufficient evidence of disparate treatment.

[3] Chairman Gould and Member Browning affirm the judge's 8(a)(2) findings and refer, for further discussion of the Board's interpretation of Sec. 8(a)(2) as it relates to employee committees or councils, to *Keeler Brass Co.*, 317 NLRB 1110 (1995); *Webcor Packaging*, 319 NLRB 1203 (1995), and *Dillon Stores*, 319 NLRB 1245 (1995).

For the reasons set forth in Chairman Gould's separate concurring opinion in *Keeler Brass*, he agrees with his colleagues and the judge that the Respondent's Safety Committees are labor organizations within the meaning of Sec. 2(5) and that the Respondent violated Sec. 8(a)(2) by dominating, assisting and supporting these committees.

In adopting the judge's 8(a)(2) findings, Member Cohen notes that no exceptions were filed to the judge's findings that the Respondent unlawfully assisted and dominated its Safety Committees. As to the judge's further finding that the Safety Committees were Sec. 2(5) labor organizations, Member Cohen agrees that, in the specific circumstances of this case, 2(5) status was established.

[4] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[5] We have amended the judge's conclusions of law to include those violations of Sec. 8(a)(1) and (3) that the judge found but failed to include in that section of his decision.

6. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by removing employees from their job positions and assigning them to a lower paying position, and denying them hours of work opportunities.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Simmons Industries, Inc., Siloam Springs, Arkansas, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies of other employees.

(b) Telling employees that they can quit if they do not like its discriminatory denial of overtime.

(c) Telling its employees that it would be futile for them to select United Food and Commercial Workers Union Local 340 or any other union as their bargaining representative and impliedly threatening them with unspecified reprisals if they select that or any other union as their bargaining representative.

(d) Creating the impression among its employees that their union activities are under surveillance by Respondent.

(e) Telling employees that a former employee would not be hired, in part because of union activities of the former employee's spouse.

(f) Threatening employees with violence by any of its supervisors or other agents if they engage in union activities.

(g) Removing employees from their job positions and assigning them to lower paying positions, denying to them hours of work opportunities because of their membership in, activities on behalf of, or support of the above-named Union or any other union, or because of any of their concerted activities otherwise protected by the Act.

(h) Selectively and disparately enforcing a rule regulating public access to its Jay, Oklahoma plant employees' breakroom by prohibiting access to that breakroom by union representatives.

(i) Dominating, assisting, and supporting the Plant Safety Committees at its Jay, Oklahoma, and Southwest City, Missouri plants, and the Jay, Oklahoma plant Fast Food Committee.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Southwest City employee Ronnie Rice, who was unlawfully removed from the box room lid machine job and assigned to a lower paying job, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ronnie Rice and Andrea Coffee, who were unlawfully denied work opportunities, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Immediately disestablish and cease giving assistance or any other support to the Plant Safety Committees at its Jay, Oklahoma, and Southwest City, Missouri plants and refrain from reestablishing, assisting, or supporting the Jay, Oklahoma plant Fast Food Committee in the manner it had done so from early 1993 through summer 1993.

(d) Allow access by the Union's representatives to its Jay, Oklahoma plant employee breakroom to the same extent and manner permitted other nonemployee visitors and solicitors.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Jay, Oklahoma, and Southwest City, Missouri facilities copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 19, 1993.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

attesting to the steps that the Respondent has taken to comply.

(h) All allegations in the complaint not found violative of the Act in this decision are dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees about their union membership, activities, and sympathies of other employees.

WE WILL NOT tell employees that they can quit if they do not like our discriminatory denial of overtime.

WE WILL NOT tell our employees that it would be futile for them to select United Food and Commercial Workers Union Local 340 or any other union as their bargaining representative and impliedly threaten them with unspecified reprisals if they select that or any other union as their bargaining representative.

WE WILL NOT create the impression among our employees that their union activities are under surveillance by us.

WE WILL NOT tell employees that a former employee would not be hired, in part because of union activities of the former employee's spouse.

WE WILL NOT threaten employees with violence by any of our supervisors or other agents if they engage in union activities.

WE WILL NOT remove employees from their job positions and assign them to lower paying positions, deny to them hours of work opportunities because of their membership in, activities on behalf of, or support of the above-named Union or any other union, or because of any of their concerted activities otherwise protected by the Act.

WE WILL NOT selectively and disparately enforce a rule regulating public access to our Jay, Oklahoma plant employees' breakroom by prohibiting access to that breakroom by union representatives.

WE WILL NOT dominate, assist, and support the Plant Safety Committees at our Jay, Oklahoma, and Southwest City, Missouri plants, and the Jay, Oklahoma plant Fast Food Committee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Southwest City employee Ronnie Rice, who was unlawfully removed from the box room lid machine job and assigned to a lower paying job, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronnie Rice and Andrea Coffee, who were unlawfully denied work opportunities, whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, plus interest.

WE WILL immediately disestablish and cease giving assistance or any other support to the Plant Safety Committees at our Jay, Oklahoma, and Southwest City, Missouri plants and refrain from reestablishing, assisting, or supporting the Jay, Oklahoma plant Fast Food Committee in the manner we had done so from early 1993 through summer 1993.

WE WILL allow access by the Union's representatives to our Jay, Oklahoma plant employee breakroom to the same extent and manner permitted other nonemployee visitors and solicitors.

SIMMONS INDUSTRIES, INC.

Stephen E. Wamser, Esq., for the General Counsel.
Hugo Swan Jr., Esq. (McGlinchey, Stafford, Lang, A Law Group), of Fort Smith, Arkansas, for the Respondent.
Renee L. Bowser, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. Based on charges filed in Cases 17–CA–16850 and 17–CA–17015 on July 19, 1993, and October 18, 1993, respectively, by United Food and Commercial Workers Union Local 340 (the Union), the Regional Director for Region 17 issued a consolidated complaint and notice of hearing on November 22, 1993, against Simmons Industries, Inc. (Respondent). The Union thereafter in Case 17–CA–17086 on November 30, 1993, charged that Respondent has been engaging in further unfair labor practices as set forth in the National Labor Relations Act (the Act). On January 27, 1994, the Regional Director issued an order consolidating all the foregoing cases and a second consolidated complaint and notice of hearing. The second consolidated complaint (the complaint), alleged that the Respondent interfered with and coerced its employees' organizing efforts on behalf of the Union at two of its plants located in Jay, Oklahoma, and Southwest City, Missouri, by 11 separate acts of coercion, including interrogations, promises of benefits, and other coercive statements to employees at the Southwest City plant and one coercive statement at the Jay plant from June 1993 through December 1994, in violation of Section 8(a)(1) of the Act.

The complaint alleges that during the same period, Respondent discriminated against six of its employees at those plants by seven different adverse actions, including one discharge, a reduction in work hours, two denials of job opportunities to one employee, and three pretextual written disciplinary warnings, because those employees joined or as-

sisted the Union, thus violating Section 8(a)(1) and (3) of the Act.

The complaint alleges that Respondent disparately enforced a rule prohibiting public access to its Jay plant breakroom in a manner that prohibited access to nonemployee union representatives but permitted access to other nonunion nonemployees in violation of Section 8(a)(1) of the Act.

Finally, the complaint alleges that Respondent maintained at its two plants Safety Committees and committees known as Total Quality Management or ''TQM'' committees, which it recognized and dealt with as employee bargaining representatives for certain conditions of employment and mandatory subjects of bargaining and that it dominated and interfered with in violation of Section 8(a)(1) and (2) of the Act.

Respondent filed an answer that denied the commission of any unfair labor practices. With respect to the Safety Committees and TQM committees, Respondent asserts that they are not labor organizations within the meaning of the Act nor are they dealt with as such but that they were developed and are maintained by it ''to serve the essential purpose of promoting, and communicating, workplace safety, quality of product and efficiency.''

At the trial, the parties were given full opportunity to adduce relevant testimony as well as the opportunity to introduce relevant documentary evidence. All three parties elected to file posttrial briefs that were received at his office on November 14, 1994.[1]

On the entire record in this case, including my evaluation of documentary evidence, the testimony of witnesses, and my evaluation of their demeanor, and in consideration of the briefs, I make the following[2]

I. JURISDICTION

At all material times Respondent, a corporation with corporate offices in Siloam Springs, Arkansas, and various facilities in Missouri, Arkansas, Oklahoma, New Mexico, and Minnesota, including facilities located in Southwest City, Missouri, and Jay, Oklahoma, has been engaged in the production, processing, and distribution of poultry. During the 12-month period ending July 31, 1993, Respondent, in conducting its business operations, sold and shipped from its Missouri facilities goods valued in excess of $50,000 directly to points outside the State of Missouri. During the 12-month period ending July 31, 1993, Respondent, in conducting its business operations, sold and shipped from its Oklahoma facilities goods valued in excess of $50,000 directly to points outside the State of Oklahoma.

It is admitted, and I find, that at all material times United Food and Commercial Workers Union Local 340 has been a labor organization within the meaning of Section 2(5) of the Act.

[1] Although notified of the pending charges and complaints, no representatives of either the Plant Safety Committee or the Total Quality Management Committee chose to appear at the trial.

[2] The Respondent's unopposed posttrial motion to correct the transcript with respect to numerous obvious minor errors is granted.

II. THE UNFAIR LABOR PRACTICES

A. *Background*

The two chicken processing plants operated by Respondent that are involved in this proceeding are located at Jay, Oklahoma, and Southwest City, Missouri, where it employs about 300 to 400 employees and about 600 employees, respectively. Each plant operated under its own set of managers and personnel directors. Both plants were subject to overall direction and policy formulated at Respondent's headquarters staff located at its corporate headquarters in Siloam Springs, Arkansas.

The operations at both plants involve the sequential cleaning, eviscerating, cutting, packaging, and shipping of chickens to customers, the most prominent of which was the Kentucky Fried Chicken enterprise (KFC). At one point, Respondent's KFC operations involved the initial implementation of the processing incidental to the KFC rotisserie chicken product that involved the rapid injection of a marinade fluid by a machine fitted with thousands of injection needles at a certain point in the production process. KFC's quality concerns strongly influenced Respondent's institution of the Total Quality Management Committees known as TQM.

In the spring and summer of 1993, the Union commenced an as-yet unsuccessful effort to organize the employees at the Jay and Southwest City plants. The institution of the Safety and TQM Committees had preceded the organizing efforts and necessarily fell beyond the 10(b) period set forth in the Act with respect to timeliness. Evidence preceding that period, however, was adduced not for the purpose of establishing prior violations, but rather for understanding the nature and functions of the committees as manifested during the 10(b) period. The General Counsel's theory of violation does not rest on argument or evidence of union animus with respect to the institution or maintenance of the committees.

Initial organizing efforts started at the Southwest City plant in early June according to Union Representative Carl Ariston. According to him, organizational meetings were held with employees in June and he visited employees' homes to solicit their signatures on union authorization cards, and the Southwest City plant was handbilled. Union authorization cards were given to employees who, in turn, solicited other employees' signatures on and off Respondent's property. Ariston testified that in mid-June 1993, he gave six black T-shirts with prounion legends printed thereon to the ''main'' Southwest City employee supporters of whom he named Peter Inda, Randy Nicholson, Karla Burrel, and James Jackson. Later, other such shirts were distributed to other employees.

Ariston testified that he distributed red-colored, prounion T-shirts in July. In early October 1993, a leaflet purporting to be a statement of prounion employees was distributed in the Southwest City plant by prounion employees. The Respondent made no effort to prevent the distribution and placement of prounion literature by employees in its breakroom facilities in the plants. The October leaflet bore the purported signatures of 19 employees, including signatures of alleged discriminatees Inda and Nicholson.

B. *Independent 8(a)(1) Violations—Southwest City Plant (Complaint par. 8)*

Eleven of the twelve allegations of specific coercive interference with the employees' Section 7 rights relate to the Southwest City plant. The remaining allegation, paragraph 8(a), is related to paragraphs 9(a) and (b) allegations of discriminatory disciplinary warnings at the Jay plant.

1. Conduct of Superintendent Gary Rockrohr

Gary Rockrohr had been the Southwest City plant night-shift manager from May 1 through August 1993 when he then became, on September 1, the day-shift superintendent of second processing. His jurisdiction on day shift covered 126 employees engaged in the processes of chilling, grading, KFC saw operation, food craft lines, spice injection, box assembly (box room), packaging, and stacking. He is alleged as an admitted agent of Respondent to have been responsible for 6 of the 11 alleged 8(a)(1) violations at the Southwest City plant. The remainder are attributed to six other Respondent agents. Rockrohr's testimony conflicts with four General Counsel witnesses to the underlying incidents. Two of these are alleged discriminatees Inda and Nicholson. The other two are box room employees Ronnie Rice and Melvin Killian. All four of them claimed to have been openly active union advocates, i.e., all except Inda, hand-billed employees at the plant, and all wore union T-shirts. Rice, Nicholson, and Killian were employed by Respondent at the time of the trial and thus risked their employer's displeasure by testifying adversely to its interests. Killian had nothing to gain except the vindication of the Union's position. Rice was alleged to have been discriminated against with respect to job assignments, and Nicholson is alleged to have discriminatorily received a formal disciplinary warning. Thus their testimony arguably tended to indirectly support a remedial order that would have benefited them. Such possible bias would have been less of a factor with Nicholson who would gain at most removal of a written warning in his personnel file.

Rockrohr, on the other hand, had only been employed by Respondent for about 2 years and, as a seemingly upwardly mobile manager, had much more to gain by testifying favorably in his employer's interest. None of the foregoing factors alone is dispositive of credibility. However, these and other factors, including demeanor, lead me to credit the General Counsel witnesses' testimony, much of which was mutually corroborated and given in a clear, convincing, essentially consistent manner. Inda admittedly had a poor recollection with respect to dates, and Rice placed a conversation in July when it clearly must have occurred in September.

Overall, I conclude that the General Counsel's witnesses exhibited a more spontaneous and convincing demeanor than the Respondent's witnesses. Rockrohr proved himself to be an evasive, calculating, and disingenuous witness in cross-examination, particularly with respect to the distribution of Respondent's campaign literature opposing union representation. This literature was distributed by Rockrohr and other supervisors to employees in the plant hallway. Rockrohr distributed this literature on two occasions to 126 employees. Rockrohr refused to even concede the innocent fact that Respondent's position on that literature opposed unionization. He incredulously testified that he did not even read what he had distributed and, furthermore, that he was unable to estimate whether or not Respondent's own literature may have even actually promoted the Union. Rockrohr thus gave the impression that in an area where he was uncertain whether his truthful testimony would adversely affect the Respondent, he would rather respond with evasions and absurdities. Thus he undermined his credibility. Except where seriously flawed, as will be noted hereafter, I find the General Counsel's witnesses to be more credible with respect to the paragraph 8 allegations and find that the following conduct was engaged in by Rockrohr.

a. *Union hat and T-shirt prohibitions (complaint par. 8(b) as amended at trial)*

On his return to the day-shift position on September 1993, Rockrohr's duties entailed indirect supervision of Inda and Rice in the box room that Rockrohr periodically inspected. It is undisputed that USDA sanitation rules required Respondent to mandate certain rules regarding employee attire in production areas, including the box room. These rules required such things as hair nets and company-provided smocks.

Rice testified in direct examination that the first time that Rockrohr saw him wearing a union soft hat in the box room and the first occasion he had worn one there, he was told to remove it, i.e., early July just after he received the shirt. Rice complied. They were alone. A week later, Rice testified that he again was seen by Rockrohr in the box room and was again told by him to remove his hat.[3] Rice testified that employee Kenny Perdue was present but was not told to remove his hat. In the next breath, Rice testified that Rockrohr told all employees present to ''take off our caps.'' According to Rice, the only employee of five present wearing a union hat, he removed it, but claimed nothing was said to Perdue who continued to wear a dirty, nonunion soft baseball cap within 2 feet of Rockrohr. He testified in direct examination that Inda was present but did not wear a hat. In cross-examination, he testified that Inda wore a union hat and removed it. This is inconsistent with his testimony that only he and Perdue wore hats and that Rockrohr told employees to remove ''our hats.'' He failed to testify whether Rockrohr lingered to observe whether his orders were obeyed.

In mid-September, Inda and Rice both wore union T-shirts but had removed their company smocks and hung them on the door, allegedly because they felt that the room was too warm. Rockrohr entered and told them to ''get your smocks on.'' In direct examination, Rice testified that all employees in the room had removed their smocks because of the heat. Thus he implied that if it were not for the heat, his proper attire would have been a covering smock. In cross-examination, Rice testified that he, Inda, and Perdue had removed their smocks but that a box maker named Janell wore her smock. Rice testified that he and Inda put on their smocks, but he could not testify with certainty whether or not Perdue failed to put on a smock within Rockrohr's point of observation.

Inda corroborates the smock incident to a very cryptic extent, testifying only that Rice was asked to put on a smock. He, however was confused at first whether it involved a hat

[3] Clearly, Rice is incorrect as to the date because Rockrohr did not transfer to the day shift until September 1 and had no occasion to visit the box room on the day shift before then.

or a smock but appeared to settle on a smock. He was not asked whether he was present and also asked to remove a hat.

Rockrohr testified that soft caps are generally prohibited because of sanitation conditions. Neither Rice nor any other General Counsel witness contradicted Rockrohr as to the sanitation-apparel rules, except Rice testified that Perdue frequently wore his baseball cap. It was not clear that Perdue always did so in the presence of a supervisor. The General Counsel's witnesses are silent about whether any of the other 600 employees wore caps or removed smocks because of heat except for some unfounded speculation and as to incidents unobserved by Rockrohr.

It is undisputed that Respondent distributed to its employees 10 printed rules regarding attire, one of which required the wearing of smocks over street clothes. The only rule referring to headgear requires the wearing of hair nets in production areas. The rules are silent as to hats. Rockrohr testified that he interpreted these rules to preclude the wearing of caps over the hair net except for the hard plastic caps issued by Respondent. He testified without specific detail and without corroboration that he had ordered an indeterminate number of unidentified employees to remove soft ball caps on unspecified dates. Rockrohr admitted the hat removal and smock wearing order but denied awareness that Perdue disobeyed.

The General Counsel cites *Republican Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), for the proportion that employees have the right to wear union insignia without interference. He also cites *Burger King Corp.*, 265 NLRB 1507 (1982), for the proposition that an employer must demonstrate special circumstances to warrant a prohibition of union insignia. The General Counsel, while acknowledging Respondent's assertion of USDA sanitation rules, argues that Respondent failed to justify its disparate enforcement of those rules.

I conclude that the General Counsel has failed to establish sufficiently clear evidence of discriminatory application of the smock wearing rule. With respect to the not-soft-hat rule, Rockrohr testified that contaminants are liable to fall from such hats onto the food processed or packed. He was uncontroverted. With respect to the hat wearing incidents, the only evidence of disparate enforcement of Respondent's headgear rule rests on the testimony of Rice with respect to his own experience, i.e., 1 of 600 employees. I find Rice's testimony as to this incident improbable as to date, uncorroborated in essential detail by Inda who was present, and internally inconsistent. With respect to these incidents, I found his demeanor less certain and spontaneous than that of Rockrohr whom I credit despite his flawed credibility. Accordingly, I find evidence insufficient on which to conclude disparity of enforcement of a facially reasonable sanitation rule. I conclude that paragraph 8(b) of the complaint is without merit.

b. *October interrogation by Rockrohr (par. 8(d))*

This allegation, like that in complaint paragraph 8(b), was amended at trial to conform with the testimony of Rice, the witness on whose testimony the allegation is founded. Because of the flawed credibility of Rockrohr, particularly as to this incident, I credit the more certain and convincing testimony of Rice and employee Andrea Coffee.

On a Friday in early to mid-October, Rice walked up to a point in the plant hallway between the personnel office and the employee breakroom where Rockrohr was handing to employees Respondent leaflets that discouraged union representation. Rockrohr asked Rice, ''Do you want this?'' Rice replied that he did not and that he was already aware that it was antiunion literature, which he told Rockrohr that he did not want to ''listen to.'' Rockrohr then asked Rice when he thought that the Union ''was coming in here.'' Rice replied, ''probably around November.'' Rockrohr then asked Rice how many union cards he had employees sign. Rice testified that he could not recall the number of cards but he told Rockrohr that he, in fact, had employees sign them. At that point, deboner Andrea Coffee walked up and Rockrohr asked her whether she wanted the leaflet. Coffee declined and told him that she did not want more Respondent lies and kept walking.

I conclude that despite the fact that Rice had openly publicized his support of the Union, inter alia, by wearing union hats and T-shirts and by rejecting Respondent's literature, there was no justification for a high ranking manager to question Rice as to the precise extent of union support among his coworkers by asking when he thought they would succeed in their representation efforts and precisely how many of them signed union cards. I find the conversation tended to coerce Rice with respect to his continued union efforts by pointedly signaling to him that Respondent was focusing on his individual involvement with the Union without simultaneous assurances against reprisals. Moreover, Rockrohr's conduct occurred in the context of other unlawful conduct to be discussed hereafter. I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(d).

c. *Threats of futility of protected activity and reprisals (par. 8(f))*

Employee Randy Nicholson signed a union card in early summer and joined other employees and union agents in handbilling other employees outside at the entrance to the Southwest City plant. At least once a week, he wore a union T-shirt and union hat. Shortly after receipt and wearing of his red union shirt in August 1993, Rockrohr engaged him in an almost daily ongoing series of confrontations up through November at a variety of locations in the plant, including the breakroom, the trash dumpster, the drydock, or the work area. Rockrohr on these occasions peppered Nicholson with remarks and questions as to his union sympathy and involvement, including such questions and comments as ''How about that union of yours?'' ''Why are you trying to get the Union in?'' ''It won't affect me one way or the other but it's not good for you.'' ''It's not going to be any good, and it's not going to help you, there's no way the Union will get in.''

Arguably, some of these comments, had they been isolated and in response to Nicholson's prounion statements, might have been innocent. But here, a high level manager daily confronted and questioned a low-level employee who had chosen to publicly display union support. I conclude that the continual expression of futility and promise of negative results to the employees formed a reasonable basis for the employee to understand that he was being warned to expect unspecified reprisals if he successfully persists in his attempts to convince the employees to choose union representation. I

conclude that the complaint allegation 8(f) is meritorious and Respondent violated Section 8(a)(1) of the Act by telling employees that designation of the Union as bargaining agent would be futile and that they could suffer unspecified reprisals as a consequence. See *Medlin Realty Corp*., 307 NLRB 497, 502–503 (1992), wherein employees were told that they would ''lose in the end'' and their representation would ''go no where.''

I further find that the same series of confrontations constituted unwarranted, inherently coercive interrogations as to Nicholson's prounion motivations and, as such, were violative of Section 8(a)(1) of the Act and that in the context of a clearly vigorous opposition by Rockrohr, his statements of futility of union representations were coercively enhanced. Compare *Alterman Transport Lines*, 308 NLRB 1282, 1285 (1992).

d. *Late November interrogations, impressions of surveillance, and threats of unspecified reprisals (Complaint pars. 8(g) and (h))*

I have already concluded that Rockrohr's daily interrogations and threats of unspecified reprisals that continued through November violated Section 8(a)(1) of the Act. Rockrohr continued to confront Nicholson. He also turned his attention to another Southwest City production employee who had hand-billed for the Union and periodically wore the red, union T-shirt, Melvin Killian. Despite some minor divergencies, particularly as to the first incident, Killian and Nicholson were essentially mutually corroborated. However, where differences exist, I have accepted Nicholson's account as more accurate. Nicholson's testimony was more deliberate and detailed and internally consistent. Both of them were more certain and convincing than Rockrohr.

On a date between November 18 and 22, Killian, Nicholson, and employee Gilstrap were seated together at about 1 p.m. eating lunch in the breakroom. Gilstrap was not seen to have worn any prounion insignia. Rockrohr, who had been sitting at a table behind them, arose, walked up behind them, sat down and joined them in conversation. Rockrohr raised the subject of the Union by asking them ''how was the big get together, your union meeting.'' He asked them whether 300 or 400 employees attended but then amended his question by saying, ''never mind, what I can't find out, I can find out from Randy [Nicholson]. He's our company stooley.'' At that point, Rockrohr got up and walked away without waiting for a response.

On the evening of November 22, the Union held another meeting with employees. One of the things discussed at that meeting was a rumor that purported union activist, swing crew employee Karla Burrel had given to the Respondent union cards signed by employees. Union Agent Ariston and two employee activists later that day visited her at her home to confront her with the rumor.

At lunch time, Nicholson, Killian, and Gilstrap were again similarly approached by Rockrohr at their lunch table. Rockrohr came up from behind them and placed his hands on the shoulders of Nicholson and Killian. Rockrohr asked them how their ''big union meeting went.'' He said, ''Well Melvin [Killian] beware, Randy [Nicholson] is our stooley,'' and that what Rockrohr would not discover on his own he would get from Nicholson. Further, Rockrohr told them that he did not need Burrel as an informant anymore. Rockrohr started to walk way, hesitated and said, ''By the way Randy, I don't appreciate you making my swing group girl [Burrel] cry.''

I conclude that Rockrohr's comments to Nicholson and Killian were calculated to and were reasonably interpreted by the recipient to conclude that the Respondent was engaging in surveillance of their protected activities and constituted coercion. It is no defense that those employees, or two of them, were open union advocates. See *United Charter Service*, 306 NLRB 150 (1992), and also *Medlin Realty Corp*., supra.

The timing of those statements on the heels of the union meeting and the flagrant attempt to create suspicion and divisiveness amidst prounion employees aggravates the severity of the coercion, as it does the coerciveness of the interrogation with which it was coupled. Accordingly, I find Respondent unlawfully interrogated its employees, implied surveillance of their union activities, and threatened employees with unspecified reprisals (i.e., the ongoing confrontation with Nicholson discussed above) as alleged in paragraph 8(g) and (h) of the complaint.

e. *Threat of violence (complaint par. 8(j))*

The final episode involving Rockrohr's apparently deep-seated proclivity toward union related confrontation occurred in December on about December 6. Nicholson was in the breakroom in the plant and about to start his shift when Rockrohr confronted him and excitedly told him that he had just finished talking to Cecil Vaughn, the shift manager at the Southwest City plant and admitted supervisor. Rockrohr told Nicholson that Vaughn said that if he ever caught employee Virgil Luff in Vaughn's trailer court residence soliciting union card signatures, that Vaughn ''would kick his [Luff's] f—ing ass.''

Any discussion of this incident is unnecessary as it is clearly and palpably coercive for a high-level manager to tell an employee that another employee will be subject to assault and battery by another manager if he engages in protected activity at a trailer court where that manager is one of many residents. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by threatening employees with violence if they engage in union activities as alleged in paragraph 8(j).

2. Conduct of Plant Manager Bridges and Supervisor Roark (complaint par. 8(c))

Paragraph 8(c) alleges that in July, Southwest City Plant Manager Paul Bridges and Supervisor Jerry Roark solicited employees' complaints and grievances, remedied same, and promised increased benefits and improved terms and conditions of employment if they rejected the Union.

Evidence in support of this allegation rests on the testimony of KFC deboning department employee Andrea Coffee whose tenure dates back to 1987. Paul Bridges has been the plant manager since January 1993 when his tenure commenced. Jerry Roark was hired 15 years ago and has been a KFC department supervisor for 6 years. All three persons are employed on the day shift.

Coffee testified that she began wearing a union T-shirt in July. The precise date is not clear. In early June, she claims to have had a conversation with Plant Manager Bridges. She

even, according to her, initiated a complaint with him. He did not solicit her complaint. She complained that a new girl, Sandy, had been hired and that Sandy was now doing deboning work whereas Coffee was helping her and she did not like it. She did not explain why she did not like it. According to her, Bridges claimed ignorance of the situation but promised to ''look into it.'' Coffee then volunteered to him the observation that the employees need a union because seniority meant next to nothing. She testified that she encountered him several times after that with the same prounion statement and he told her to ''calm down'' and that he would look into it and take care of it without the Union. Two weeks later, she and Sandy were assigned reverse positions.

Bridges' recollection was uncertain as to conversations with Coffee but generally tracked that of Coffee. He testified that he told her to give him a chance to look into the situation and she did make the remark about needing a union to which he did not respond. He admitted that at some time he did tell her that he would talk to the department supervisor and would ''try to take care of'' her problem. He could not recall making other remarks and was thus unable to categorically deny them. Bridges testified that he did talk to her supervisor, Roark, and was told that because of the repetitive nature of deboning, it was necessary to periodically interchange the functions of the laborer and the person who collects miscut parts and brings them to the deboner by means of pushcarts. He had no recollection of giving the supervisor any instructions regarding her complaint nor of changing any assignment that Roark made.

Roark testified to a conversation he had with Coffee prior to her complaint to Bridges. She neither contradicted him nor rebutted his testimony, which I accordingly credit. Initially, Coffee complained to Roark that it was not fair for her to collect the chicken parts for deboning, and he explained to her the necessity to periodically trade off assignments between the deboner and collector of parts the way it had always been done and it would not be fair to the new employee to discontinue that practice. His characterization of past practice was never disputed. Apparently, Coffee did not like the idea of a new employee benefiting from the periodic exchange. Roark explained to Bridges that it was only fair to switch employees who were paid the same wage and not to compel one employee to perform the heavier task of lifting up to 25-pound parts while keeping the other at the stationary repetitive deboning job. He testified, without rebuttal contradiction, that he and Bridges went and explained his fairness objective to Coffee and she then agreed with it. He testified, without rebuttal, that Coffee's specific complaint was that she wanted to sit on a stool and debone all the time. He was not contradicted that the deboner and collector had traded functions every 30 minutes throughout the summer of 1993 and thereafter.

Based on the unrebutted and thus uncontradicted testimony of Respondent's witness, Roark, there had been and continued to be a tradeoff of job functions between deboner and collector. I therefore conclude that Respondent solicited no complaints from employees and remedied no complaint but continued to do what it always had done with respect to the job tradeoff in question. It is therefore unnecessary to evaluate whether it would have been unlawful for Respondent to investigate employee complaints in absence of evidence that it had not been its past practice to do so, and in the face of allegations that Respondent's preexisting practice in part had been to respond to employee suggestions via the TQM and safety committees. Accordingly, I find no merit to complaint paragraph 8(c).

3. Conduct of Southwest City Plant Employee Coordinator Frank Crosby (complaint par. 8(l))

It is alleged that on November 25, Crosby, an admitted supervisor, told an employee that a former employee would not be rehired in part because of that former employee's spouse's union activities.

The General Counsel witness in support of this allegation is currently employed by Respondent, i.e., Virgil Luff, who had been its night-shift personnel manager from September 1992 to November 22, 1993. For personal reasons, he transferred from that managerial position to that of a forklift operator on November 22. His new job took him outdoors for a substantial part of his workday. Both Crosby and Luff worked the day shift. I found that Luff possessed greater fluency, spontaneity, certitude, and conviction in demeanor than Crosby. He was also more detailed. Furthermore, he was testifying against the interests of his employer to no advantage to himself except for the vindication of his prounion sympathies, i.e., he espoused the union cause and wore a union insignia on his jacket during late 1993. I credit the testimony of Luff and find that the following events occurred.

On November 24, shortly after Luff had started his new job duties, and after he had left the breakroom, he stopped by the personnel office to chat with Crosby. They discussed his enjoyment of his outdoor job. Luff commented that he noticed that a former employee and had been seeking reemployment at the plant. Crosby told Luff that Respondent did not want his kind in the plant because he had tested high for drug abuse a year earlier ''and besides that his wife supports that union crap.'' Luff then returned to work and the conversation ended.

Clearly, Crosby realized or should have realized that Luff was no longer a managerial employee (if indeed he had ever exercised statutory supervisor authority) and was not subject to protection of the Act. I agree that it is inherently coercive for an employee to be told that employment rights are jeopardized by the protected activities of their spouses. I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 8(l) of the complaint.

4. Statements of Supervisor-Trainee Tim Smith and Supervisor Bud Gow on December 9 and 10, 1993, to Forklift Driver Luff (complaint pars. 8(k) and (l))

These two complaint allegations arise out of incidents that occurred on December 9 and 10, 1993, in a small room near the shipping office where the outside drivers such as Luff took their breaks. On December 9, Luff was taking his break there with truckdriver Benny Claxton and shipping employee Chris Moreland and other unidentified hourly paid employees. Supervisor Trainee Tim Smith allegedly entered and made a statement to Luff.[4] A credibility resolution between Luff and Smith is difficult. Luff was an employee at the time of trial, but Smith was not employed by Respondent and appeared to be a disinterested and also an uninterested witness.

[4] Although at that time Smith was a trainee supervisor, his status as a statutory supervisor on that date is admitted.

Both suffered from poor recollection of what was said and both admitted difficulty in recalling precisely what was said. It is undisputed that Luff was wearing an outdoor jacket, previously given to him as a manager, onto which he had affixed a union insignia. It is alleged that Smith coercively interrogated Luff. However, even if Luff's testimony is credited, Smith merely angrily expostulated at the sighting of the union insignia on the former manager jacket:

> [W]hy do you have that f—ing Union patch on your jacket? You're not stupid enough to support that f—ing Union.

Although it is not entirely clear from Luff's testimony, it appears that without waiting for a response, Smith asked whether Luff worked at Hudsons, a nearby poultry plant where employees are represented by the Union. The room immediately fell silent and Luff went outside back to work.

Luff's general demeanor and certitude were very good, but uncharacteristically his testimony with respect to the December 9 incident was very poor. He hesitated and had to be prompted by counsel and responded in a monotone suggestive of a memorized answer. Despite Smith's also uncertain responses, I cannot comfortably credit Luff on this point. In any event, I find that Smith's conduct appeared to consist more of an angry rhetorical outburst, wherein no answer was actually expected from an openly proclaimed union supporter. I find no merit to paragraph 8(k).

On the following day in the same room, at his breaktime, wearing the same jacket and union insignia, Luff encountered Shipping Supervisor Gow who, on noticing the union patch, also reacted with a statement that is alleged to constitute coercive interrogation and a threat of wage reduction. The two witnesses' recollective certitude improved somewhat as to this incident but, again, neither proved to be entirely convincing. Gow admitted that his recollection was vague, and Luff could not recall some incriminating things that I find Gow admitted were said. Based on the relative strength of certitude regarding parts of the conversation and admissions of Gow, I find the following conversation occurred.

When Gow looked at Luff's union patch, he exclaimed, ''you're not crazy enough to support that lazy Union are you?'' Without waiting for the obvious answer from the self-proclaimed union sympathizer, Gow went on to say: ''It makes no difference to me but it would cause problems.'' Luff responded, ''I hope so.'' Gow then stated it really didn't make any difference but it could affect wages [because] wages could go down because everything starts [from] ground zero from what I understand.'' I find that he also stated, ''and [it could affect] our salaried people.'' To that, Luff merely shrugged and departed.

I find that Gow merely uttered rhetorical expostulation to an openly self-identified union adherent that called for no response. I further find that the balance of his statement would have clearly been understood by the former night-shift personnel manager as a reference to the possibilities inherent in collective bargaining and did not tend to be construed as a threat of vindictive retaliation. I therefore conclude that there is no merit to paragraph 8(l).

Paragraph 8(e) relates to an alleged coercive statement to Andrea Coffee to the effect that she could quit if she did not like the denial of overtime alleged to be discriminatory and violative of the Act in Section 9(g) of the complaint. Paragraph 8(e) will be discussed in the context of 9(g) below.

Paragraph 8(a) of the complaint is related to alleged discriminatory disciplinary warnings to two employees at the Jay plant in paragraph 9(a) and will be discussed hereafter.

C. *Alleged 8(a)(1) and (3) Interference and Discrimination at the Jay Plant—Sexual Harassment*

Paragraphs 9(a) and (b) allege that Jay plant employees Earl McKinley and Danny Ward were issued discriminatory disciplinary warnings on November 15 and 16, respectively, because of their union activities or sympathies. Paragraph 8(a) alleges that one of them was told that the discipline was unlawfully motivated. Respondent's proffered defense is that the two employees were reprimanded in proportionate severity to their participation in what Respondent perceived to be was sexual harassment of coworker Michelle Van Buskirk on November 11, 1993, or at least for their creation of a hostile environment conducive to sexual harassment.

The underlying facts regarding the November 11 incident are not essentially disputed. What occurred on that day was that Ward and McKinley had engaged in some horseplay that escalated into conduct toward Van Buskirk that reasonably could be construed as sexual harassment. The General Counsel's theory of violation rests on an argument of disparity of treatment toward known union activists Ward and McKinley and toward known outspoken antiunion employees, i.e., Michelle's husband, Shane Van Buskirk, whom it is argued displayed sexually offensive remarks on his hand-scribbled, antiunion sloganed work apron 1 month earlier. The General Counsel also relies on the alleged admissions that constitutes the paragraph 8(a) allegation. Ward and McKinley openly wore prounion T-shirts to work once or twice a week. They both solicited signatures for union cards, sometimes in the breakroom. At some unknown date late in 1993, McKinley distributed leaflets outside the plant entrance. Moreover, with respect to the Shane Van Buskirk incident, it was McKinley who complained to Jay Plant Manager Robert Stauber about the antiunion apron, thus disclosing his own prounion sentiments.

The incident of Thursday, November 11, arose at a saw table tended to by Ward, McKinley, Michelle Van Buskirk, and Art Adams. The four were positioned in a square pattern as they cut chicken parts that were mechanically conveyed to them. Even Michelle Van Buskirk admitted that in the past, her male coworkers threw scrap animal parts about, although contrary to their testimony, she claimed that she had not before been the target. Their past horseplay is irrelevant because she had never complained before and it was not proven to have been known to Respondent to have involved sexual references.

On the day of November 11, ice chips were thrown down the front of Van Buskirk's blouse that became saturated with melted water. None was thrown by McKinley who formed the northeast point of the square and looked north, away from Buskirk who was the southwest point facing north and Ward who was the southeast point facing north. Adams formed the northwest point facing south to Van Buskirk. Van Buskirk testified that only Ward threw the offending ice chips down the front of her blouse but that Ward and McKinley joked about the effect on her cold wet breasts, i.e., that Ward said that he bet that it hardened her nipples to the

extent that it interfered with her ability to saw and that McKinley said that her ''headlights'' had shone so brightly that they could not see. She testified that she later complained about this conduct to Respondent. In an interview with its four managers on Monday, the November 15, she signed a statement. Present were Stauber, personnel director at Jay; Vernon Holland, Jay plant second processing superintendent; Wayne Dunham; and Corporate Human Resource Director Roger Brune who was called in from headquarters by the local managers. That document recited that she had been afraid to say anything to the offending males because they would ''get mad'' at her.

Ward testified that it was Adams who threw the ice and made the ''headlights'' comment but admitted that he made the hard nipples comment, at which all four employees laughed. In cross-examination, he admitted that he had thrown ice down her blouse repeatedly, laughed, and made the comments while McKinley faced away from them.

McKinley testified that Ward was behind him and that he faced away from Ward and heard only ''bits and pieces'' of the comments that he testified went on ''for a couple of hours.'' Ward testified it lasted only 10 minutes. McKinley testified that ''someone'' made the headlight comment but that he and Ward were too busy with work to pay attention to Adams who continued picking on Van Buskirk because the line of chickens was too full. Yet, McKinley earlier testified that it was a slow day and the four of them had joked together. McKinley testified that when he was called to the office on Monday and interviewed by the four managers, he admitted laughing but accused not only Adams but Ward of throwing ice. Later, when examined by union counsel, he claimed that it was Adams who made the headlight remark and had done so three or four times earlier as well. He identified Adams as a close friend of Shane Van Buskirk, of whose antiunion conduct he took earlier offense. In cross-examination, he admitted that he actually saw Ward throw the ice down Van Buskirk's blouse three or four times and that, contrary to Ward's testimony, it was Ward who made the ''headlights'' comment, not Adams. However, he insisted that Adams made the ''hard nipples remark,'' although he, McKinley, admittedly laughed. Ward, however, admitted it was he who made that remark.

Clearly, Ward and McKinley have given self-contradictory and mutually inconsistent testimony regarding the incident. Having testified that they gave these versions to Respondent, I conclude that Respondent reasonably concluded, as I do, that Van Buskirk gave the more accurate and credible version of what occurred. I also credit the testimony of Stauber and Holland as to admissions made to them in those investigative interviews. Clearly, Ward and McKinley falsely tried to incriminate Adams either to exculpate themselves or because Adams was perceived to be allied with Shane Van Buskirk who had persuaded his wife to complain personally about the incident on Monday, after his own hearsay complaint was rejected by Stauber on Friday.

When Ward received his warning on November 16 at a meeting with Stauber and Holland, Ward protested to them that the discipline that he and McKinley received in the form of a written warning for sexual harassment was simply the result of an attempt at revenge by Shane Van Buskirk against Ward and the Union for his participation with McKinley in earlier protesting to Stauber Shane Van Buskirk's antiunion apron.

Ward testified that Holland made a damaging admission to him at a point after Stauber had left the room momentarily, thus providing himself with the lack of a corroborating witness. According to Ward, it was then that Holland told him in response to the revenge accusation, ''I know it, but that's just between you and me. I'm getting pretty tired of the union business.'' Even if credited, argument can be made that the statement does not constitute a clear-cut admission. Respondent may have suspected that Shane sought revenge, but it may also have concluded that regardless of her husband's motives, the treatment toward his wife warranted disciplinary action. In any event, I do not credit Ward because of the above-noted contradictions and inconsistencies. Secondly, Holland was more certain and convincing in demeanor. Finally, I find it highly improbable a high-ranking manager would have blithely admitted the pretextual nature of an unlawfully motivated action. I find Holland's version more probable and convincing, i.e., he told McKinley, not Ward, that he was getting tired of all this ''family business,'' i.e., McKinley's earlier protest was premised on his belief that Shane Van Buskirk's hand-scribbled, antiunion apron was directed at his wife. The apron had written on it 10 reasons not to support the Union, one of which was ''if it wasn't for the Union, we wouldn't have to look up these union skirts.'' Another listed reason argued by the General Counsel to be sexual innuendo was the statement, ''Union supporters sleep with animals.''

For reasons noted above, I discredit the testimony of McKinley and Ward wherever it conflicts with Respondent's witnesses. I find that Respondent had reasons to believe that the two prounion employees had engaged in conduct that tended to constitute sexual harassment or a sexually hostile environment for which Respondent might have been liable under pertinent Federal statutes. Respondent reasonably concluded that Adams' participation was of a lesser extent and warranted only a verbal warning. With respect to sexual harassment, Respondent had issued written warnings previously.

With respect to the argument of disparity of treatment, the earlier incident involving McKinley's protest resulted in the corrective action of an order issued to Shane Van Buskirk confiscating his apron. Unlike the conduct toward Michelle Van Buskirk, it was not patently aimed at one particular victim nor directed at another person's body in her presence, regardless of whether or not such conduct actually led to a generally sexually hostile environment. No direct victim complained about the apron, whereas Respondent refused to act upon Shane Van Buskirk's complaint until his wife complained. I reject as conclusionary and incompetent limited testimony of General Counsel's witnesses that of 300–400 employees in the Jay plant, only McKinley wore a skirt. I credit Holland that there were others. I do not find that Respondent's interpretation of sexual harassment regarding the offensive apron with respect to a definition of sexual harassment is correct or not. It is enough that there are sufficient differences in the two factual situations that preclude me from finding that prounion employees were disparately treated.

Accordingly, because of the foregoing finding, I conclude that there is no merit to complaint paragraphs 8(a) and 9(a).

D. *Alleged Discrimination at the Southwest City Plant*

The balance of paragraph 9 of the complaint, subsections (c) through (g), alleges discriminatory conduct involving Southwest City employees Peter Inda, Andrea Coffee, Randy Nicholson, and Ronnie Rice, all of whom openly proclaimed themselves as union supporters who wore union shirts and hats.

1. The alleged October 20, 1993, discharge of Peter Inda (complaint par. 9(e))

Inda was employed as a box machine operator in the Foodcraft area. In the spring of 1993, he solicited fellow employees to sign union cards and distributed union shirts to them in the plant breakroom. There is no specific identification of any supervisor who actually saw him do it although supervisors also use the breakroom, which at times can become fairly crowded. Although he wore a red union T-shirt, so did all the employees in his area that also included fellow alleged discriminatee Rice. However, Inda was one of the 19 employees who signed the union handbill that he testified was distributed about 1 month before his discharge. Actually the handbill was distributed in mid-October during a week when Inda was absent for illness.[5] Inda admitted his inability to recall dates of events.

Since 1988 at the Southwest City plant, Respondent maintained an attendance disciplinary point system whereby an accumulation of 12 points resulted in discharge. Incidents of tardiness and absence are weighted by points. However, 2-week periods of perfect attendance result in a weighed point reduction. According to both Clark and Luff, as a matter of practice, the Respondent converted a ''pointing out'' termination as a leave of absence retroactive from the date that the employee subsequently presents a written medical statement, provided that the statement set forth a medically excused absence of at least 5 days. Preprinted requests for leave of absence forms were available to employees for such purpose. The bottom of the form entitled ''approval'' provides for the signatures of the supervisors and the nurse. Luff testified that as night-shift personnel manager he approved of retroactive medical leaves of absence several times. He testified that the applications were tendered to himself or the nurse. He did not explain further. The plant nurses review the medical appropriateness of the medical releases submitted by the employees.

Southwest City Plant Personnel Manager Malcom Clark, corroborated by Luff, testified that the 12-point dischargee is entitled to rehiring on application after 90 days. Luff testified to a ''90 day rehire waiting period.'' Inda admitted that he had been aware of past instances when employees who pointed out, i.e., employees discharged for 12 points or more were rehired. Malcom testified further that Respondent, at a time of a shortage of employees, waived the 90-day waiting period for 60 days. He testified that the point system had otherwise been generally employed for at least during the 6 years of his experience. He further testified that there had been no limit on the medical reasons proffered and he had in three instances allowed employee leaves of absence for personal reasons. At present, Respondent's policy comports with the Federal Family Leave Act. Former Night-Shift Personnel Manager Luff admitted to the existence of a retroactive medical leave policy. He also testified that there were occasions when employees who had pointed out were given a ''second shot'' at their jobs without any break in service. He named Teresa Robbins who had six such chances in less than 1 year and James Poe who was allowed to work down his points without a break in service. In later direct examination by the Union, he then testified that Robbins pointed out two or three times in 1993. He gave no further details as to circumstances or dates, nor reference to periods of employee shortage. Nicholson testified that employee Pam Jones had pointed out but had been allowed to continue working without a service break.

Clark testified that 40–50 employees point out each month, of whom 40 percent are rehired after 90 days. He admitted that there were exceptions to the practice often in hardship cases and in times of employee shortage. He cited the case of Mr. and Mrs. Jones who had both walked out of the plant in protest of having been given a disputed point, which thus pushed Mrs. Jones beyond the limit with one more point. After consultation with the supervisors involved and in consideration that the circumstances involved an on-the-job injury, Mrs. Jones was put on probation and allowed to work off her points without a break in employment. Clark contradicted Luff's generalized, unfounded testimony regarding Robbins by testifying that during a 6-year employment history interspersed with 12-to 24-month periods of nonemployment, there was no single year where she was reemployed six times in 1 year. Clark similarly contradicted generalized testimony regarding James Poe, i.e., that he had accumulated 18 points before being given a leave of absence.

The General Counsel adduced the testimony of Luff regarding an alleged toughening of Respondent's policies toward prounion employees. Luff testified to a conversation he had with Clark at a time in July 1993 when Luff was still the night-shift personnel manager and Clark was his immediate supervisor. This occurred in a meeting concerning the scheduling of employees in a supervisor's office with several other supervisors and managers. According to Luff, Clark testified that certain known prounion employees would not be given ''non-scheduling'' to go to a union meeting, i.e., sent home without points. He did not name the employees.

Luff went on to testify that Clark also stated at the meeting and individual conversations with Luff that with respect to the attendance point system as it applied to prounion employees, that there would be no tolerance for union supporters. Luff explained that they were told to be given points ''for any reason if they were a minute late or a minute early, and that no tardiness could be tolerated one way or the other'' if they were union supporters. He gave no context for this selective account. In further examination, Luff explained that ''non-scheduling'' occurred at times when employees were sent home without points because an excess of employees reported for work.

Clark admitted to some conversation with Luff regarding a situation where Clark observed Karla Burrel leaving for home on nonscheduling in mid-week. Clark explained that nonscheduling occurred usually at weekend to avoid overtime. Luff purportedly denied that he had nonscheduled her. Clark asked Burrel to explain and was told that she had done

[5] The handbill included the signatures of Kenny Perdue, the alleged favored box room employee who was supposedly allowed to wear a dirty hat, Karla Burrel, and Joe Whitney who will be discussed below.

excessive work earlier in the week and was leaving to avoid overtime at the end of the week. Thus some kind of context for the aforedescribed conversation appears to have been a reasonable springboard for the topic. However, Clark denied making any reference to denying nonscheduling time to prounion employees.

Clark admitted to having had a discussion with managers regarding tolerance of the point system. He testified that it had been his past standing policy, which he reiterated in answer to a question from a supervisor, that there could be no toleration of even 1 minute's tardiness. He denied however, that any distinction was made with respect to prounion employees and he categorically denied the statements Luff attributed to him. Luff was not called to rebut the context as testified to by Clark.

I find Luff to be the more convincing witness. Luff was more fluent, spontaneous, and certain. Clark's testimony was rendered in a machine-like, hesitant monotone frequently interspersed with pauses. Clark was the more interested witness. Luff, as an employee, had little to gain by testifying adversely to Respondent. However, he assisted the Union at the counsel table throughout the trial.

Despite the higher credibility of Luff, I find much of his testimony conclusionary, unfounded, and of impaired probative value. With respect to the toleration conversation, I credit his version of it as far as it goes. However, since there is no evidence as to whether or not Clark's past practice generally involved ''zero toleration'' for point accumulation, his testimony as to such is uncontroverted. Thus, even if he did tell his subordinates that prounion employees would be given no toleration for point accumulation, it is not clear that he was announcing a policy of disparity of treatment or whether he was merely telling them that engagement in union activities did not earn prounion employees immunity from his ongoing zero toleration policy. Similarly, the nonscheduling reference is ambiguous. It is not clear that Clark's statement was that prounion employees would be denied nonscheduling on occasions when they would otherwise be granted same, or whether it would be denied them when asked for simply to attend a union meeting and when they were not otherwise entitled to it.

All of this background now takes us to the events of Inda's pointing out for absence in mid-October 1993.

On Tuesday, October 12, Inda fell ill at work. After notifying his supervisor of his progressive illness and with proper notification, he left the plant at 3 p.m. and remained absent for the balance of the week. He did not call in on October 13. On October 14, prior to the opening of the personnel office, he left a message with the plant guard that he was too ill to report to work. On Friday, October 15, he failed to call in. He testified that he received a telephone call that day from recently hired safety coordinator Larry Stephens, an admitted supervisor in the personnel office, who asked him if he could predict a return date. Inda answered that he would try to report on Monday, October 18. Stephens purportedly told him that it would be a good idea to obtain a medical release before he returned. Inda admitted that each time he talked to Stephens, he understood the need for a medical release. Thus Inda implicitly admitted awareness that his tenure was in jeopardy and that a medical release was necessary for the retaining of employment.

On Monday, October 18, according to Inda, he was examined by a Dr. Crosby who diagnosed acute bronchitis and who recommended 2 more days of no work. Inda testified that he preferred to return to work and later telephoned Stephens whom he told of his medical diagnosis and his intention to ''try'' to return to work Tuesday, October 19. On Tuesday, October 19, he testified that he again called Larry Stephens and told him that he still was too ill and would report Wednesday. According to Inda, Stephens told him that if he did come in on Wednesday that he ought to see Gary Rockrohr first, early before Inda's shift start time.

Inda testified that he arrived at the plant between 5 and 6 a.m., Wednesday, October 20, and that while waiting in the breakroom 30 minutes later, he observed Rockrohr enter at the opposite end of the room that contained other employees, look in his direction, turn, and depart. Inda did not know whether Rockrohr actually saw him waiting there. Inda made no effort to meet with Rockrohr.

Inda testified that while he continued to wait, he observed Stephens go to the personnel office, where Inda followed and approached him and asked what to do. Inda testified that he was told to wait in the breakroom and to wait for Southwest City's day-shift personnel manager, Kent Johnson, who would talk to him. While Inda was waiting, a number of employees told him that his job had been posted as open for bid. Somewhat later, according to Inda, Stephens came and told him that Johnson was not there yet and he should continue to wait. Stephens returned to the personnel office where Inda later followed him and asked if he had been terminated and was told yes.

Inda testified that he returned to the breakroom and waited until 9 a.m., at which time Stephens came and told him he did not know when Johnson would arrive, which might be late afternoon, and that he might as well go home. Inda testified that he showed his medical release to Stephens who looked at it and nodded. Inda thereupon departed the breakroom at 9 a.m. Charles McClellan, Inda's supervisor, testified credibly and without contradiction that he encountered Inda at breaktime at 9:30 a.m., in the superintendent's office when Inda walked up and asked if it were true that he had pointed out. McClellan told him it was true but that Inda needed to talk to Clark or to the complex manager, Gary Murphy. Inda testified that his only contact with Respondent thereafter occurred at some unspecified date when he called about some money he claimed was due to him. Despite his admitted awareness of Respondent's rehiring policy of pointed-out employees, of which there is no dispute that he had become by October 13, Inda never sought reinstatement.

Personnel Director Malcom Clark testified without contradiction that Day Shift Personnel Manager Kent Johnson terminated his position in June 1993 and was partially replaced by Stephens. Johnson transferred to the night shift. Stephens fulfilled some of Johnson's duties on an interim basis, however, not under the designation as personnel manager but rather as personnel clerk. The remainder of Johnson's duties were assumed by Clark. Johnson worked on the night shift until August 1993 when he terminated his employment.

The General Counsel argues that Inda surely must have meant to refer not to Personnel Manager Johnson but to Personnel Director Clark, and that his reference to Johnson is

a mere minor discrepancy. However, in cross-examination, Inda was insistent that Stephens did not refer to ''the personnel director,'' but rather explicitly stated that it was ''Johnson'' to whom he was to speak. Clearly, as with dates, Inda possessed a faulty recollection at least with respect to names as well. However, because Stephens did not testify, I am constrained to credit him that he was told that he may as well return home. However, I conclude that the most that Inda could reasonably conclude was that the necessary interview, whether with Johnson or Clark, was to be postponed but not canceled, i.e., the burden was still upon Inda to do something to obtain approval for a medical leave of absence or to apply for reinstatement 90 days later.

Respondent's personnel records reveal that Inda pointed out on October 13, 1993, and was terminated on that date. The underlying documentation for his point accumulation is not disputed. Clark never was presented with a medical release for Inda and never was contacted by him for reemployment. Clark testified that on Wednesday, October 20, he was told by Stephens that Inda wanted to see him with respect to a medical leave of absence, that Stephens asked whether he should send Inda to the plant nurse or tell him to wait to see Clark. Clark asked how long Inda had been absent and was told 4 or 5 days. Clark testified that he informed Stephens that because of the length of time, Inda should be instructed to wait and see Clark. However, Clark had to attend a meeting that lasted until 10 a.m. After the meeting, Clark went to the breakroom but Inda had departed, did not return and left no message.

The General Counsel's theory of disparity of treatment of Inda rests on his contention that other employees had been permitted to submit their medical releases directly to the plant nurse, but Inda, who had not asked to do so, was not permitted to do so in the expectation that Inda would just go away if he had to wait too long to see Clark. There is no evidence that any of the actual points accrued by Inda were due to the alleged zero tolerance policy or whether they were for clear-cut, nonmarginal attendance violations. The points accrued for his absence the week of his discharge are not disputed as nonmeritorious or the result of the alleged zero tolerance policy. Rather, the zero tolerance attitude of Clark is argued to explain his instruction that Inda see him and not the nurse.

There is no evidence as to when and under what circumstances employees may apply directly to a plant nurse for a retroactive medical leave of absence without having to be interviewed by a supervisor. Even Luff testified that it was he who, as manager, approved of retroactive medical leave requests that were either tendered to him or to the nurse. The General Counsel relies entirely on an admission by Clark that plant nurses ''review'' medical releases for appropriateness tendered to them, sometime directly by employees. There is no evidence that plant nurses have had sole and exclusive discretion to approve retroactive medical leaves of absence, nor is there evidence that supervisors or managers ordinarily do not participate in such application reviews. The form application provides space for a supervisor's signature.

I conclude that at best the General Counsel has proven Respondent animus toward the Union mainly through the conduct of Supervisor Rockrohr; that the Southwest city personnel director intended to apply a zero toleration policy to prounion employees; and that Inda was a known union supporter. It is undisputed that Inda pointed out pursuant to past attendance disciplinary policy and did not pursue the avenue held out to him for either retroactive medical leave of absence or for 90-day delayed reemployment. It was not shown that the zero toleration policy deviated from past practice nor that requesting Inda to see a manager first, rather than a plant nurse, constituted disparate treatment, nor that such requirement was so onerous that it would reasonably be construed by Inda to be an act of futility.

I conclude that the General Counsel has failed to adduce sufficient evidence to support an inference that Respondent was at least partially motivated by Inda's union activities when it requested that he present his medical release to the personnel director in the expectation that Inda would abandon his medical leave application. I conclude the General Counsel thus did not sustain its burden of proof under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Furthermore, assuming the disparity of the zero tolerance policy, I do not conclude that Respondent placed such an onerous burden on Inda that it constituted a constructive discharge by virtue of Inda's refusal to bear that burden, i.e., to wait and present his medical release directly to the personnel director is itself a very simple and undemanding task for a person slowly recuperating from a debilitating illness. By virtue of Inda's abandonment of a retroactive medical leave of absence request and/or 90-day waiting period reemployment entitlement, Respondent's motivation was never really put to the test. According, I find no merit to complaint allegation 9(e).

2. October 27, 1993 disciplinary warning to Randy Nicholson (complaint par. 9(f))

Nicholson started work for Respondent on December 28, 1992, on the Foodcraft department where the continued thereafter. He performed such duties as trash removal to the dumpster at the drydock and the washing down of that area. His union activity included handbilling and insignia wearing. Respondent's awareness of it and animosity toward it were manifested by the coercive conduct in the form of interrogations, threats, and statements of implied surveillance by Superintendent Gary Rockrohr as found above. Nicholson was one of the 19 employees who signed the prounion handbill distributed at the Southwest City facility in mid-October.

Nicholson was issued a written disciplinary warning dated Wednesday, October 27, 1993, for ''use of profanity,'' which set forth as follows:

> Randy was cussing and yelling in the hall at shift change about the poor management in this facility.
>
> This conduct is unacceptable and will not be tolerated.
>
> This is a written warning. Any future incidents of this nature will be cause for further disciplinary action.

The document was signed by Personnel Director Clark, Shift Manager Rick Smith, and Supervisor Ron Horn, all admitted supervisors and agents of Respondent. The form indicated that Nicholson had refused to sign it.

According to Nicholson, he had built himself up to a state of emotional agitation over a 2-week period because of his perception that his night-shift counterparts, the trash han-

dlers, were not doing their jobs, i.e., trash was left over when he started the morning shift. He complained about it several times to the night-shift manager, Rick Smith, who promised to correct the problem but who allegedly did not. On the morning of October 27, Nicholson concluded that the problem continued and he became upset. He walked out of the processing area and walked down the plant hallway where he loudly proclaimed.

> I see how this [f—ing] night shift management gets things down, they can't even get trash taken care of; how can they get product shipped out the back door.

Manager Smith's description of the scene is uncontradicted and credited. Smith had been standing in his office doorway that opened to the hallway. At that time, there were three or four persons in the area. Employees were in the office getting written order forms. Nicholson had stopped immediately in front of Smith's office. Smith testified that he said nothing to Nicholson. However, Nicholson testified that he had been unaware of any manager's presence. He testified that after his remark, Smith approached him and, with a liberal use of the same ''F'' word, admonished Nicholson for criticizing his night shift and how he supervises that shift and how he get things out the back door and didn't want to hear ''stuff like that again.''

Smith later summoned Nicholson to the office where he reported to Clark and Nicholson's day-shift foreman, Horn, what Nicholson had said in the hallway. Nicholson essentially admitted the foregoing version of what he said. Clark told him that he was to receive the written warning for the use of profanity. According to Nicholson, he protested that Clark should do the same to Smith for his profanity against Nicholson, but Clark retorted that Nicholson precipitated the incident. Smith claimed that Nicholson asserted that he should be reprimanded for the use of profanity by virtue of quoting Nicholson. This version is, on its face, absurd and uncorroborated by Clark. Horn's account more clearly corroborates Nicholson whom I credit as to the reprimand interview. Clark was the only witness to claim that Smith pointed out that women were present in the hallway. I discredit him. In any event, Clark testified that the concern that he entertained, which motivated the issuance of reprimands for profanity, was whether it constituted abusiveness toward fellow employees or to supervisors. Thus such evidence as to the use of profanity, vulgarity, and cuss language by employees and supervisors at the plant was irrelevant because Nicholson's conduct consisted of a loud, clear, public, profane disparagement of management, i.e., Manager Smith.[6] On the face of such conduct which verges on insubordination, a reprimand of some sort appears to be reasonable unless it be shown that other nonprounion employees' similarly known conduct went undisciplined.

General Counsel witness Luff admitted that when he was a manager he had discharged a female employee for the repeated abusive use of profanity. He also testified to instances where he had issued disciplinary warnings for aggravated use of profanity by employees to one and another.[7] From this inconsistent testimony, I can only conclude that profanity between employees was liable for discipline only in aggravated situations when it constituted abusiveness or according to the tolerance level of different supervisors.

The only incident comparable to the severity of Nicholson's conduct is found in the testimony of Luff. According to him, on an unspecified date when he was night-shift manager, as he walked in the door, he overheard employee William Howe utter to himself, ''I don't know how we can get a f—ing thing done when the superintendent doesn't even known what's going on.'' Luff testified that Smith was about 6 feet away. His testimony is silent as to whether Smith gave any indication of having heard the remark and, if so, whether or not Howe was reprimanded. Luff does not explain why he tolerated the remark despite having disciplined employees for abusive profanity toward other employees. Smith testified without controversion that he never supervised Howe. He also denied having heard Howe or another employee make that remark. In any event, the mitigating factors are that Howe uttered the remark to himself, not loudly in a public hallway in front of coworkers. Furthermore, there is no evidence that Smith or Howe's actual supervisor heard the remark or should have heard it, because there is no evidence of what the noise level was or what Smith may or may not have been preoccupied with at the time, nor is there evidence of context wherein the remark necessarily meant to refer to Smith.

Based on the record evidence, I cannot conclude that Respondent had a history of toleration of loud, public, profane disparagement of managers by their subordinates in instances where the managers formally complained of such conduct so as to justify a conclusion that Nicholson was reprimanded even in part because of his union activities. Accordingly, I find paragraph 9(f) of the complaint to be without merit.

3. The mid-August 1993 reduction of hours of work of Andrea Coffee (complaint par. 9(g)); invitation to quit (par. 8(e))

These allegations relate to KFC chicken deboner Andrea Coffee who was involved in the preceding discussion of paragraph 8 allegations. Throughout the summer of 1993, she actively and outspokenly supported the Union, in the presence of supervisors wore union shirts, and contemptuously refused Rockrohr's distribution to her of Respondent's antiunion literature that she characterized to him as ''lies.'' I discredit Rockrohr's claim that he did not hear Coffee's characterization. For reasons already set forth above, I discredit Rockrohr's testimony where it conflicts with Coffee or other General Counsel witnesses except where otherwise noted.

The day following Coffee's caustic dismissal of Rockrohr's distribution efforts, she testified that she was approached by him at her work station. As he pointed at her, Rockrohr ordered her supervisor, Ron Horn, not to assign to her more than 8 hours of work. Horn denied the incident and denied having been ordered by Rockrohr to limit Coffee's

[6] The General Counsel's argument that because Smith was not specifically named in the warning does not detract from the fact that that was whom Nicholson had in mind, and that it was he who would reasonably be understood to be the target of the complaint.

[7] Smith identified several employees whom he had disciplined for intemperate outburst of cursing.

worktime to an 8-hour day.[8] She testified that the next morning, Horn instructed Coffee that she was no longer to start her workday at 7:30 a.m. but was to start at 8 a.m. She testified that thereafter, she worked an 8-hour day, i.e., from 8 a.m. to 5 p.m. and ''no more and no less.'' She testified that she was dismissed at 5 or 4:30 p.m. to wait in the breakroom for her fellow carpool member to finish. While she waited, she observed other employees continue with work that was performed at her work station until 6 p.m. She named the twins, Wendy and Cindy, as well as Melissa Gault and Donnie Williams as some of those who continued with her work. She admitted, however, that some of those employees did not necessarily always receive overtime pay because many times, some of them would not arrive at work until noon because of tardiness. She also admitted that there was a period of time that she left work early for medical appointments.

Coffee testified that when Rockrohr ordered Horn to restrict her overtime, he explained that he did not have the work for deboning.

Coffee testified that in September or October, she confronted Clark in his office and demanded to know why she could not work the same hours as other employees and he told her that there was no longer KFC deboning, i.e., just regular deboning. She testified that she approached Day-Shift Manager Dan Henderson a week after that change at the conveyor belt and asked him the reason for the change in her work hours but got no response. She testified that she confronted him three different times thereafter with the same questions and got no answer. During this time in October, she claimed that she had been assigned to a rework team that would have entailed overtime but Ron Horn told her she had to leave at 5 p.m. while others assigned to it continued to work. The next day, she cornered him at the Foodcraft line as they were forming a work crew in early October. She asked him why she was not allowed to work until 6 p.m. Allegedly, Henderson told her that if she did not like it, she could quit.

Coffee explained that she and Melissa Gault were the two regular deboners. Donnie Williams was a parts' person who brought chicken parts to the deboner. She testified that Gault regularly started at 8 a.m. but, because of a babysitter problem, she often arrived at noon and worked until the job was finished. The twins, Cindy and Wendy, often came late at noon or 2 p.m. Coffee testified that she often observed swing crew employee Stoffer, as well as other nonregular deboner Tina Burton and Pam, a grader, deboning after Coffee switched to the 8 a.m. start time. Coffee explained that different employees variously performed her work. She admitted that she was not present at 7:30 a.m. However, when she arrived at the deboning station, these employees were observed by her already in progress of deboning work. When deboning was heavy, some of them continued to help the regular deboners. In this testimony, she is uncontradicted. Thus, according to her uncontradicted testimony, there was abundant deboning work that justified the augmentation of the deboning staff. Yet, according to her testimony, she was told to start work one-half hour later and she was dismissed at 4:30 or 5 p.m. Her testimony is uncontradicted that the summer of 1993 experienced the heaviest deboning in recent history.

Coffee was returned briefly to a 7:30 a.m. starting time after 2 or 3 weeks and again switched back to the 8 a.m. start time until January 1994, when she was restored to the former 7:30 a.m. starting time that would appear to be the nadir of the chicken processing season that did not start to pick up again until April.

Coffee's payroll records disclosed that in 1992, she averaged 141.06 regular hours and 6.76 overtime hours per month. For the last 4 months of 1992, she averaged per month 149.18 regular hours and 8.35 hours of overtime. In 1993 from January through August, Coffee averaged a monthly 145.54 regular hours and 10.84 hours of overtime. For the last 4 months of 1993, she had a monthly average of 146.88 regular hours and 4.98 overtime hours. The payroll records show that Coffee did not sustain an immediate reduction of overtime in August 1993. Rather, for 2 of the 3 weeks that she worked 40 hours or more, she earned substantial overtime. She worked only 23.9 hours in the last week of August. Respondent adduced undisputed testimony that its business is seasonal. A high is reached in summer because of a demand for KFC products that usually slacks off in the fall. For the last 4 months of 1993, Coffee worked only 2.30 less monthly regular hours but 3.36 less monthly hours of overtime than she did in 1992. The General Counsel refers to the overtime reduction as a halving. Actually, it is 40.23 percent less overtime hours, on the face of it a proportionately high figure. However, we are talking about a period of time which involved about 600 hours of regular work and a reduction of overtime from about 33.40 overtime hours in 1992 to very slightly less than 20 hours, or a totality of about 13-1/2 hours. However, the payroll records reveal that from the second week of October 1993 to the end of December, she received no overtime except for .4 of an hour the first week of November. In 1992, she worked 16.2 hours in the month of October, 6.10 hours in November, and 6.3 hours in December. Thus, if the same pattern had been followed in 1993, she would have had a much higher amount of overtime. We do not have any documentation as to prior years and thus have no way of evaluating whether the figure is statistically significant in comparison to past fluctuations that occurred at seasons' end. However, the loss would be more significant if we knew the totality of deboning hours worked by all employees for that comparable period, whether regular deboners or those doing it on an ad hoc basis. Such a comparison would have been more meaningful in making a more definitive determination that Coffee lost a significant amount of available deboning overtime work to other deboners, including nonregular deboners whom she testified were called in to perform her work while she was restricted to a shorter workday than was available in deboning work. Only the work hours of regular codeboner Melissa Gault for the months of September through November 1993 were submitted by Respondent who points to the comparability of overtime worked between Coffee and the other regular deboner, Gault, i.e., 422.2 regular and 4.9 overtime hours for Gault and 464.8 and 19.9 overtime hours for Coffee. Yet, it is undisputed that Gault had a severe tardiness problem which led to her ''pointing out'' on December 17.

[8] Because Rockrohr did not transfer back to the day shift until September 1, the incident either occurred later than mid-August or the distribution incident occurred in late August.

Respondent adduced record evidence as to the relative absenteeism of Gault and Coffee for the period of September through November 1993, which it argues discloses a comparable absenteeism record. (Gault had pointed out on December 17 and was dismissed.) For that period, Gault worked only two 40-hour weeks with 2 hours of overtime each week. Coffee worked 40 hours 5 of the 13 weeks plus 2 more within a fraction less than 40 hours. The hours worked of both Coffee and Gault for those 3 months in 1993, including overtime, are as follows:

1993	*Coffee*	*Gault*
9/5	40/14.2	35/0
9/12	38.3/0	24.8/0
9/19	32.2/0	39.3/0
9/26	40/0	40/2
10/3	40/2.4	40/2
10/10	34.4/0	39.2/0
10/17	39.7/0	29.9/0
10/24	40/0	31.2/0
10/31	33.8/0	26.8/0
11/7	40/.4	31.2/0
11/14	26.2/0	38.2/0
11/21	29.6/0	30.2/0
11/28	30.6/0	16.1/0

Coffee's payroll records from September 1 through December 31, 1993, show that she worked 5-1/2 regular hours more per month than her monthly average of regular hours worked in that period in 1992, and slightly more than 1 hour per month than her monthly average for the first 8 months of 1993. Thus the General Counsel argues that Coffee did not appear to lose overtime because of an increase in absenteeism argued by Respondent. However, the General Counsel's calculation includes partial weeks of less than 40 hours for which no overtime is earned.

Payroll records indicate that in September 1992, Coffee worked only 1 week of at least 40 hours. She was absent the first week. She worked 3 of 4 weeks in October 1992 with overtime for each week. In November 1992, she worked 3 of 5 weeks for 40 hours with overtime each of those weeks. The first week of December 1992, she worked 35.5 hours with no overtime. She did not work the second week but worked 40 hours in each of the last 2 weeks, the first of which she received 6.3 hours of overtime. Thus, in 1992 from September 1 through December 31, Coffee worked nine 40-hour weeks of a total of 15 weeks worked. (She did not work at all the first week of September 1992.) That compares to 5 of 16 weeks worked for the same period in 1993. She worked 39.7 hours the third week in October and 38.3 hours the second week in September. She was absent the third week in December 1993. Focusing a bit more closely to the period when Coffee's overtime drastically fell off the second week in October through December 1993, Coffee worked only two 40-hour weeks of 11 weeks worked to qualify for overtime.

Coffee did not testify nor did the General Counsel argue that Coffee was reduced in regular hours worked that were available for her. Indeed, she complained that her hours were fixed at an 8-hour workday. It was the loss of overtime about which she complained. The inordinately high ratios of less than 40-hour weeks worked might be due to the fact that Coffee voluntarily chose to work less than the maximum 40-hour week she complained that Respondent had imposed on her or that she was precluded from a full day by being sent home earlier. Coffee's ''track sheet,'' or record of absenteeism, tardiness, and early departures, discloses that from September 1, 1993, to December 31, 1993, Coffee was absent 3 days and left early 3 days and was tardy once. Because of overlapping incidents, this record only accounts for 6 truncated weeks, thus leaving 6 weeks of less than 40 hours unaccounted for by voluntary workday curtailment. One absence occurred on September 15 but all other incidents were subsequent to October 8, 1993, i.e., the period of greatest of overtime deprivation.

In any event, the total hours of regular work by Coffee for the last 4 months of 1993 were virtually the same as 1992. Respondent's production records might have provided some meaningful comparison to relative amounts of total KFC or even deboning work between 1993 and past years, but none were submitted into evidence.

Rockrohr and Horn deny any plan or scheme to restrict Coffee's overtime hours at Rockrohr's instructions. Rockrohr testified that he had issued outstanding orders to reduce overtime generally at the end of the summer season because of the seasonal depression in business, but no documentation was provided. They both contradict the finger-pointing scenario described by Coffee that occurred after the rejection of Rockrohr's leaflet distribution.

Horn testified that he changed the starting time of both Gault and Coffee for efficiency purposes. He explained that the meat that is to be deboned must accumulate as bad parts accumulate as they are rejected by the graders after the sawing operation of four saws. The graders thereafter take the rejected parts to the deboners. He testified that although the shift started at 7:30 a.m., it took ''5 to 10 minutes'' before the sawing got going.

He testified that it took 30 minutes before enough parts accumulated for the two deliveries. Horn did not testify as to whether or not unfinished deboning work carried over from the night shift. Rockrohr testified that shortly after he returned to days as superintendent on September 1, 1993, from his daily tour on the night shift, he concluded that it was inefficient for two deboners to sit around for ''15 to 20 minutes'' before there was any need for them and he instructed Horn ''to look into it.'' It is undisputed, however, that Wendy and Cindy had tardiness problems and that Gault had a babysitter problem and was persistently tardy.

Horn testified that he explained to Coffee that her starting time was being changed because of the foregoing efficiency explanations. He denied that he ever instructed her to leave precisely at a fixed time regardless of the state of her work. Rather, he told her to start at 8 a.m. and to work until all the accumulated parts are deboned, which he testified usually occurs 15 minutes after the KFC saws stop operating. Horn testified that everyone in his department was scheduled to rework functions on a rotating team basis at certain times of the week, including Coffee, and that he never ordered her to leave earlier than any other member of her rework team. He explained that there were about 40 KFC department employees consisting of five teams of about eight employees, each who were assigned rework and that Coffee did such work 3

days a week for at least part of the day. It is unknown whether Respondent maintains production records of the amount of rerun work performed either generally or by employees. No such documentation was submitted.

With respect to the number of employees used as deboners, Horn testified that during the busy season starting in April, there may be times when three deboners are used and sometimes extra persons also are assigned. Rockrohr testified that there is a drastic reduction in KFC work after labor day. No production records were submitted for the year 1993.

Horn transferred to the night shift on October 25, 1993, and had no supervision of Coffee thereafter until April 1994, when he returned to the day shift.

Shift Manager Daniel Henderson admitted that Coffee encountered him in his office and protested that she was not receiving overtime whereas the other deboner was receiving more overtime. He promised her that he would look into it. He testified that a couple of days later when Coffee was putting away her tools, he told her that he had checked her time sheets and concluded that she worked more overtime than the other deboner, i.e., Melissa Gault.[9] Coffee protested that other KFC department workers were receiving more overtime than she was. She named one female worker whose name Henderson had forgotten. He testified that he checked the records and found that Coffee had more overtime. He testified that he explained to Coffee that overtime is based on the specific job being done and that her job did not entail overtime.

Henderson testified that in another confrontation between himself and Coffee in front of other employees in the plant hall, he told her that they had already discussed the issue but if she insisted, they could do it in the office but she refused. Henderson denied that he told her that she could quit if she did not like it.

Supervisor Jerry Roark testified that in the summer of 1993, he crossed over between the day and night shifts to supervise KFC work and later switched to the day shift where he supervised Coffee. He testified that KFC deboners were not needed for the first 15 months of sawing operations. The discrepancies as to whether deboners were not needed for the first 5, 10, 15, or 30 minutes described by various Respondent witnesses was never fully explained. Roark testified in a slow, hesitant, uncertain, halting demeanor that when he returned to the day shift, Coffee's complaint to him was that she wanted to work an 8-hour day from 7:30 to 4:30 p.m. ''and just go home.'' Horn, however, testified that Coffee had never told him that she wanted to end her shift at 4:30 p.m. Roark claims he permitted her to work from 7:30 to 4:30 p.m. until he obtained ''approval'' and ''worked it out with the other KFC deboner, Gault, whom he testified had been complaining that she had to work as late as 5:15 p.m. According to Roark, Gault inexplicably complained about the later starting time despite her tardiness record. Horn was silent as to any such request by Gault. Thus, according to Roark, the later deboning start time caused the deboning for Gault to extend beyond 5 p.m. Implicit in his testimony is the admission that the deboning work could be finished earlier with an earlier starting time. If that is so, there necessarily was work available earlier than 7:30 p.m. Indeed, in consequence, Roark testified that he thereafter instructed both Gault and Coffee to start their shifts at 7:45 a.m., which he estimated was 15 minutes after KFC operations began. Inasmuch as he was not dispensed from efficiency considerations, there clearly was deboning work available at least by 7:45 a.m. Roark testified that at one point, Coffee actually complained to him about being compelled to work beyond 4:30 p.m. but that he ordered her to stay until the work was done, i.e., she insisted on a 7:30 to 4:30 p.m. shift. He denied ever having restricted her to an 8-hour day. In cross-examination, Roark's description of the nature of Coffee's complaint shifted drastically. Now he admitted that Coffee persistently complained to him and to Henderson that she was being cheated out of overtime work. Clearly, this clashes with her alleged desire to end the day at 4:30 p.m. Roark failed to explain this inconsistency. Furthermore, Horn failed to corroborate his testimony that Coffee merely wanted an 8-hour day from 7:30 a.m. to 4:30 p.m. Henderson testified that Coffee's complaint was deprivation of overtime. Coffee's testimony that she was permitted to resume a 7:30 a.m. starting time is uncontradicted. Given that fact, it was incumbent on Respondent to adduce some explanation of why that had been permitted, particularly during the so-called depth of the season as compared to October when, according to Roark, deboning work just started to decline by ''a little bit.''

Clearly, the issue of who worked how many regular and overtime hours in KFC work and deboning work and when it was worked could have been resolved by Respondent's records. Yet, the only documentation adduced by Respondent was that which compared Coffee with Gault. The latter was undisputedly afflicted with a tardiness record. Respondent's documentation does not conclusively establish that Coffee had a comparable tardiness or early leave record. Records do establish that Coffee experienced a decline in 40-hour or near 40-hour workweeks compared to 1992, and the reduction cannot be fully explained by her absenteeism and tardiness track sheet.

The General Counsel has the burden of proving that Respondent was at least partially unlawfully motivated in taking an adverse action against Coffee. If he sustains that burden, the Respondent must sustain its burden of demonstrating that such adverse action would have occurred in any event, regardless of the protected activity of Coffee. *Wright Line*, supra.

The General Counsel has adduced the testimony of Coffee that was contradicted by Respondent witnesses Rockrohr, Horn, and Roark. Coffee was obviously interested in the Union's vindication. She also had to gain some minor amount of lost overtime compensation. On the other hand, she risked the displeasure of her employer by testifying adversely to its interests. I found her to be a certain, spontaneous, and convincing witness. Rockrohr's lack of credibly was discussed above. Horn did not fully corroborate Roark. Horn's testimony was given with a diminished certitude. Roark's demeanor was very poor with respect to certitude and conviction. Inconsistencies and lack of full corroboration erode their credibility. Henderson's denial of the ''quit and

[9] Actually, the essence of Coffee's complaint was that she was being restricted to a shorter day and other employees like Gault, Wendy, and Cindy, who were consistently tardy, were permitted to work until 6 p.m. Technically, the tardy employees would not have recorded overtime compensation on the days of tardiness if they worked less than 8 hours.

look elsewhere'' statement was half-hearted and unconvincing. I credit Coffee as to any inconsistencies with Respondent witnesses. All Respondent's witnesses testified with inadequate documentation to support this assertion.

Based on credited testimony, and to some extent documentation, the General Counsel has established the following facts. Coffee was an outspoken supporter of the Union and a critic of Respondent's policies. She strongly directed her sentiments toward Rockrohr who was primarily responsible for most of Respondent's acts of interference as found above, including threats. Coffee had contemptuously rejected Rockrohr's distribution of antiunion literature. Shortly thereafter, Rockrohr transferred to the day shift. He ordered the denial of overtime work to Coffee. Very shortly thereafter, Coffee's overtime work dropped off drastically. 1993 was one of Respondent's busiest KFC seasons in many years, including 1992. KFC work only started to decline a ''little bit'' in October. Yet compared to 1992 that had experienced a slower KFC season, Coffee's overtime work shriveled up at a more drastic rate than in 1992. Had the 1992 pattern of overtime work continued, Coffee clearly would have been assigned much more overtime from mid-October through December.

The General Counsel has adduced evidence of known outspoken union sympathies and activities by Coffee, specific animosity toward union activity by Rockrohr, the manager responsible for most of Respondent's acts of interference's with employees' Section 7 rights, and an order by Rockrohr to reduce overtime assignments to Coffee on the heels of her most recent confrontation with him. Thus the General Counsel has shown the classic elements of a violation, i.e., knowledge, animosity, and timing. With respect to adverse action, the General Counsel has established a comparative decline in overtime for Coffee in the busier year of 1993 than she received in 1992. Furthermore, other employees performed deboning work at times before and beyond the shift limitation placed on Coffee. I conclude that this evidence is sufficient to base a finding that Respondent was at least partially motivated to change and restrict Coffee's worktime and overtime because of her union activities.

I conclude that the burden shifted to Respondent to prove that Coffee's shift start time and actual hours of work, inclusive of overtime, would have been the same regardless of her union sentiments and activities. The evidence as to the efficiency motivation with respect to starting time is inconsistent. There was no explanation as to why it was efficient to allow Coffee to start at 7:30, then 8, then 7:45 a.m. and then in January, 7:30 a.m. when KFC work supposedly was the least busy. Respondent's comparative data is too limited and inconclusive. I conclude that the General Counsel, having proven a prima facie violation, it has then become incumbent on Respondent to submit conclusive documentation within its control that might have definitively shown either that Coffee had not been adversely affected or that she was not discriminatorily treated with respect to the distribution of overtime work to regular or irregular deboning employees, e.g., documentation as to the work performed by the other employees Coffee claimed to have performed deboning work before and beyond her restricted shift time. Accordingly, I conclude that Respondent has failed to sustain the burden of proof shifted on it. *Alterman Transport Lines*, 308 NLRB, supra. I therefore conclude that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily reducing the work hours of Andrea Coffee as alleged in paragraph 9(g) of the complaint.

4. Discrimination against Ronnie Rice

a. *Denial of swing crew job (complaint par. 9(c))*

Rice has been employed on the day shift at the Southwest City plant in September 1991. Rice testified that he signed a union card on May 12, 1993. He testified that he solicited and obtained the union card signatures of fellow workers. He also participated in 20 union handbillings at the Southwest City plant entrance in the presence of union representatives. This activity, he testified, occurred from May 12, 1993, through December 1993. It is clear that his union sympathies and activities were known by Respondent by September 1, when Superintendent Gary Rockrohr transferred back to the day shift and became exposed to Rice's wearing of union shirts and hats in the box room described above. The evidence is not so clear as to the precise date Respondent had become aware of the extent of Rice's protected activities and the intensity of his union support relative to the operative date of the alleged discriminatory swing shift job refusal. However, it is undisputed that Rice openly wore a union hat to the plant in July 1993 and, since some indeterminate date in May, probably May 12, solicited union card signatures in the breakroom at times when supervisors were present. There is no evidence of supervision reaction or actual awareness of what he was doing. Certainly, Rockrohr did not have occasion to observe it before September 1.

Until early June 1993, Rice was employed as a day-shift hand-saw operator. From May through August, Rockrohr was on the night shift and had no supervision over Rice. However, before May 1 and after September 1, 1993, as second processing day shift superintendent in charge of 126 employees, Rockrohr had responsibility with respect to the selection of swing crew members of which there were about 40 to 50 such jobs in the second processing areas, 18 of which were in the KFC area. The swing crew job is sort of a jack-of-all-trades position which calls for an employee to have enough diversified skills and experience to substitute for temporarily opened positions or those that need temporary augmentation. It is undisputed that the swing crew job is not subject to Respondent's open job, seniority bidding procedure. Rather, swing crew openings are filled on merit at the discretion of the superintendent from a standing file of written application forms which employees may file at any time. The job offers upward mobility potential and 25 cents hourly more than Rice's class 6 hand-saw job.

Rice testified that he applied for a swing crew job shortly before a date in June 1993. His written, signed, and dated application of March 5, 1993, again exposed Rice's faulty recollection as to dates. Rice testified that before the opening, he asked and was told by Rockrohr that there was to be an opening and was invited by him to file an application. Clearly, this had to have been before March 5. Rice testified that he heard nothing thereafter. He later learned that employees Rick Ledford and Joan (or Priscilla) Edwards got the open jobs. He testified that on an unspecified date, he asked the reason and Rockrohr explained to him that those two employees stepped down from higher positions to take the jobs. One was a supervisory trainee and another was in personnel

work. In cross-examination, Rice amended that testimony by testifying that Rockrohr explained to him that those two candidates had more seniority and that is what they talked about. Again, this must have occurred before May 1, when Rockrohr went to the night shift.

Rice testified that he had performed every job in the KFC department and several jobs in the Foodcraft area and had been given ''gold sheets'' for four jobs. Gold sheets indicate an employee's qualification at line speed for a particular job for payroll purposes. Contrary to his testimony, Rice's application claimed possession of only three gold sheets and knowledge only of ''several other jobs throughout the plant,'' and stated that he currently does ''several jobs.''

The selection of Ledford and Edwards occurred in the spring of 1993. Clearly, it must have occurred before Rockrohr transferred to the night shift and thus preceded Rice's union activities. Moreover, according to Rockrohr's uncontroverted testimony, those two candidates had previously been swing crew members. Ledford had been swing crew member in 1992 and at the end of 1992 had moved into a superintendent trainee position for 4 months when he requested a voluntary demotion back to swing crew. It is also his uncontroverted testimony that Edwards was returned to the swing crew from a trainee position in the personnel department because of the lack of need for her services there. Moreover, a trainee's function, by virtue of its position, requires knowledge of the jobs to be trained for. It is undisputed that Rockrohr also passed over other applications for swing crew positions who had more diverse experience than Rice. On these uncontroverted facts, it is clear no discriminatory conduct was engaged in against Rice in the spring of 1993.

From May 1 to September 1, Rockrohr did not supervise Rice nor did he appoint applicants to swing crew positions. On an indeterminate date in early June, Rice transferred to the box room where he was appointed to the position of box lid maker by Supervisor Roark. This assignment, at Rice's request, was made because Rice, who had injured his elbow, had received a medical certification that prohibited elbow movement and repetitive motions and he was therefore given the box room job as light duty. The job opened because the incumbent, Paul Hatmon, was on vacation. In that job, Rice made lids for 40-pound and 70-pound capacity boxes and folded 40-pound capacity boxes and dropped them down a chute. His coworker, Peter Inda, made the 70-pound boxes. Rice admittedly retained his higher paid grade 6 hand-saw rate of pay. He admitted that he was assigned to the box room because of his medical restrictions and that it was considered to be a light duty assignment. He testified that the repetitive motion restriction continued thereafter and was not lifted although the elbow restriction was removed immediately before he began the box room job.

In July, Rice and Inda started wearing union shirts in the box room, but the confrontations with Rockrohr did not occur until after September 1. I have discredited Rice's testimony above that he had his first confrontation with Rockrohr in July. That was impossible.

It is undisputed that the next swing crew position opening was filled by the appointment of employee Joey Whitney by Malcom Hernandez, the superintendent of second processing, apparently in August 1993 during a 2-week period when Rockrohr had transferred to the day shift but acted only as a day-shift manager. Whitney's swing crew request form was dated August 4, 1993. It was approved by Hernandez. Whitney's employment dated to October 11, 1990. He claimed therein the ability to work ''any jobs'' but one in Foodcraft and also experience in the box room and ''stackoffs.'' It is Rockrohr's uncontradicted testimony that at the time, Whitney periodically wore the red union shirt. Whitney was one of the later signatories of the prounion, mid-October handbilling. Unlike Inda, Rice did not sign the mid-October handbill. There is no competent evidence of any antiunion activities by Superintendent Hernandez nor knowledge by him of Rice's activities.

When Rockrohr assumed his day-shift second processing superintendent job on September 1, he appointed Mark Lewis and Karla Burrel to swing crew positions. They had applied on August 5 and September 1, respectively. With respect to Lewis, Rockrohr testified without corroboration that he acted on the representation of the KFC supervisor to him that the job had been promised to Lewis; and that Lewis' record was an overall ''good employee.'' With respect to Burrel, it is Rockrohr's uncontroverted testimony that she had performed at different times 10 different positions, had college credits close to degree status and was a good employee. Her application reflected this and also claimed that she had supervisory experience elsewhere. Rockrohr testified that he appointed her despite her display of union insignia. Rice admitted that at that time Burrel was openly prounion. There is no competent record evidence about whether she, in fact, thereafter became disloyal to the Union. The only indication of possible disloyalty to union effort is based on nonprobative hearsay rumor and relates to a later date in time. Ariston identified her as one of his main organizers. Her name is entered in large script as the first employee signature on the mid-October, prounion handbill. It should be noted that rumors as to her disloyalty occurred in the context of Rockrohr's efforts to sow suspicion and divisiveness among union supporters as he tried to do with Nicholson.

It was only subsequent to these swing crew appointments of Lewis and Burrel that Rockrohr focused his attention upon Rice as a prounion activist. The first occasion came when he observed Inda and Rice wearing the union shirts and/or hats in the box room during one of his inspection tours. On one occasion, Rockrohr jokingly asked Rice and Inda whether he was safe amidst the prounion box room employees. It was, however, not until mid-October, that Rockrohr openly identified Rice as an activist who might have inside information as to the status of the union organizing effort by interrogating him. Even then, Rice was not one of the mid-October union handbill signatories. About that time, Rice, like Coffee, but not so caustically, had rejected Rockrohr's proffered ''anti union'' literature. Prior to these confrontations, the evidence at best identifies Rice as a publicly self-proclaimed union supporter as had been Lewis and Burrel.

I conclude that the evidence fails to establish that Respondent was motivated unlawfully with respect to the swing crew selection of September 1, as there is a lack of the elements of specific animosity toward Rice or awareness of greater union loyalty by him than either Lewis or Burrel at that time or evidence that Rice was, in fact, clearly more well qualified than either of them. Certainly, Burrel's qualifications were geared to the upward mobility aspect of the job.

I conclude that with respect to the foregoing swing crew appointments, the General Counsel has failed to sustain his burden of proof under *Wright Line*, supra.

One more appointment to the swing crew was made by Rockrohr which bypassed Rice in fall or early winter of 1993, i.e., the appointment of Pedro Rodriguez to replace Lewis who quit. Having concluded that Rice had been previously passed over by Rockrohr for nondiscriminatory reasons, i.e., his belief that Rice was only nominally qualified in comparison to the others, I conclude that the burden is on the General Counsel to demonstrate disparity of treatment with respect to Rodriguez.

Rockrohr testified that he considered Rodriguez to be the superior candidate. He testified without controversion that Rodriguez had demonstrated the ability to perform six or seven job functions, had received good recommendations from his supervisors and had an employment record of 3 years' service. On the face of it, Rodriguez thus had claim to greater expertise than what Rice had set forth in his ongoing application. Rice then joined several other rejected applicants who possessed similar or better qualifications. One of those also dated back to March 1993.

Based on the foregoing facts, I do not find that the General Counsel has adduced sufficient evidence to establish that Respondent was actually motivated, at least in part, by its union animus when it failed to appoint Rice to the swing crew job in the fall of 1993, despite evidence of knowledge of and hostility toward Rice's union loyalty. There is no evidence of disparity of treatment but, rather, a past history of bypassing Rice for the swing crew job even predating his actual, and later specifically known or suspected, union activities. Accordingly, I find no merit to paragraph 9(c) of the complaint.

b. *The October 20, 1993 posting of the lid machine job and appointment of Rice to another lower paying job*

Rice testified that despite the fact that the lid machine transfer in early June 1993 was a light duty assignment to accommodate his medical restriction, he was entitled to the job permanently.[10] This conclusion, advanced in argument by the General Counsel, is premised on Rice's testimony regarding a conversation with his supervisor, Roark, in mid-June on about only 2 weeks after he was put in the box room job. According to Rice, he merely asked Roark if the job was permanent and Roark immediately said ''sure.'' No context for the conversation was given. Roark testified that he transferred Rice from the hand-saw to the lid machine job because of a directive from the nurse to put Rice on light duty and Rice's request for the box room job. He denied telling Rice anything about the length of the job. He did not flesh out this cryptic testimony with an explanation as to why he tolerated such an extended light duty assignment if, in fact, it were not permanent. Indeed, he did not actually deny that he considered it so. However, he testified that that box room job ''is not a full fledged job all the time.'' In cross-examination, Rice admitted that Roark did not, in haec verba, say the job was ''permanent.'' He testified that the entire conversation was as follows: ''when Hatmon [the vacationing employee] did not return, I asked [Roark] if I can have the job and he said, 'yes.''' It is undisputed, however, that Hatmon did not quit his employment until July 6. Thus Rice's second version of the conversation is subject to some ambiguity as to the date and duration of the assignment, particularly since Rice was continued to be paid at the higher handsaw rate, suggestive of a temporary situation, and Rice continued with his medical restriction.

On October 18, Inda's job had been posted as open to seniority priority, competitive job bidding process. On October 19, Rice's lid machine job was also posted for bidding. About that time, a lower paying ice room job also opened up and was posted for bid. In the process of arranging for the posting of Inda's 70-pound box job, Rockrohr, who had been on the night shift all summer, ascertained, in a suspiciously roundabout manner, that Rice was being paid a higher rate than was due the lid machine job. He testified that Roark explained to him that it was because Rice had been on temporary light duty. Rockrohr testified that he ascertained from the plant nurse that the medical restriction had been lifted. He did not specify the date nor which medical restriction, i.e., elbow or repetitive motion. Rice testified that the restriction upon his elbow movement had been lifted even before he started his job but the repetitive motion restriction remained thereafter.

Rockrohr testified that he then confronted Rice and told him he could bid on the posted lid job or return to the higher paying handsaw job and remain at the class 6 rate but that Rice stated he did not want to get his hands dirty or to touch chickens anymore. Rockrohr testified that he had concluded that when the vacationing employee, Hatmon, had failed to return to his lid-making job, it became open for bidding, which would have occurred had it not been temporarily filled as light duty. He explained that when he discovered the light duty need had terminated, he posted the job for bidding.

Rice admitted to the awarding of posted jobs according to seniority. Those who were thereafter awarded the lid machine and 70-pound box job over the bids of Rice in both jobs had higher seniority. Rice received the grade 3 or 4 ice room job.

Rice testified that when he first saw the posting of his lid machine job, he confronted Roark who disclaimed any knowledge as to why it was posted, protested that he had nothing to do with it and referred Rice to personnel clerk Cindy Carpenter. Roark did not contradict Rice and did not corroborate Rockrohr's account of their alleged conversation. Rice testified without contradiction that Carpenter, whom he confronted, could give him no explanation but referred him to Rockrohr. Rice testified that he confronted Rockrohr in his office and asked for an explanation as to why almost 5 months went by before the job had been posted but received no explanation. Rockrohr did not contradict this aspect of Rice's testimony. If Rockrohr truthfully testified as to the reasons why he suddenly posted the lid job, it would have been inexplicable that either Roark, Carpenter, or Rockrohr himself would have failed to explain that to Rice at the time. Rice demanded an explanation. Because of the uncontradicted aspects of Rice's testimony as to these events and the lack of corroboration of Rockrohr by Roark, Carpenter, the plant nurse or some documentation as to the lifting of Rice's medical restriction at that time, I must discredit Rockrohr who already suffered from a credibility vulnerability as described above.

[10] Rice testified that because of his elbow restriction, he was not operating the regular handsaw but was running a one-handed saw.

Casting further doubt upon Rockrohr's explanation is the failure of Roark to testify as to just why he knowingly permitted Rice to continue working for almost 5 months at the lid job at a grade 6 rate until Rockrohr took action immediately after having focused his identification of Rice's activist union role and made him the subject of his unlawful coercive conduct. There was no evidence that Roark was such an incompetent supervisor as to have been guilty of such managerial negligence. Subsequent to the posting of the lid machine and 70-pound box jobs and openings thereafter, Respondent assigned employees there on light duty without recourse to open bidding. Furthermore, it is undisputed that Rice's predecessor on the job, lid machine employee Paul Hatmon, had obtained it without bid and had held it for 6 or 7 months thereafter until he quit. This comports with Roark's description of the lid machine job as not a ''full fledged job.''

I find that the General Counsel has established a prima facie showing of unlawful motivation and sustained the *Wright Line* burden of proof by virtue of having proven protected activity, specific animus toward it by a supervisor chiefly responsible for virtually all Respondent's acts of interference, and timing of adverse action almost immediately following thereafter. I conclude that the burden shifted to Respondent to demonstrate that it would have taken the same action against Rice had it not been for his protected activity and Rockrohr's animosity toward of it. The explanation for Respondent's conduct rests upon the uncorroborated, undocumented testimony of a discreditable witness. I find that such otherwise unsupported evidence is unconvincing and insufficient to sustain Respondent's burden of proof. Accordingly, I find that Respondent violated Sections 8(a)(1) and (3) of the Act by the October 1993 posting of Rice's lid machine job and his assignment thereafter to a lower paid job, as alleged in paragraph 9(d) of the complaint.

E. *Jay Plant Access Issue*

Paragraph 7 of the complaint alleges that Respondent maintained a rule prohibiting public access to the employee break room at the Jay, Oklahoma, plant. It further alleges that on about October 6, 1973, Respondent's Jay plant complex manager, Merle Larson, selectively and disparately prohibited access to that breakroom by nonemployee union representatives while permitting nonunion, nonemployees access. Respondent admits that in October, Larson did prohibit access to the Jay breakroom to nonemployee union organizers but avers that it did so in enforcement of a rule against public access to that area. The Respondent denies that it had engaged in disparate enforcement of its no-public access rule. The General Counsel adduced evidence which he asserts demonstrates past nonenforcement of that rule to a variety of public solicitations, including both profit and nonprofit food vendors, jewelry sales, auction notifications, an automobile repairman, and sales of hunting knives and raffle tickets.

It is undisputed that the Respondent has never reduced to written form its alleged no-public entry policy nor has it posted upon the breakroom bulletin board or elsewhere such prohibition. At best, Respondent's evidence establishes a haphazard or casual monitoring of solicitation in the breakroom despite the fact that supervisors and managers take breaks and lunch with employees in that same room.

The Jay plant employs from 300 to 400 employees on two shifts. The breakroom measures 20 feet by 125 feet. One long windowed wall forms part of the plant exterior facing Dial Street. The parallel interior wall has an entrance into a plant hallway leading to the production area. One short end wall exits into the hallway leading from the public front door. The other parallel hallway wall has entrance from the hall into the office areas at which the plant receptionist sits. The interior of the breakroom can be viewed from the reception area but only from an awkward angle. Upon entry, a visitor first encounters to his right the door to the breakroom. A few steps beyond to the left is the reception clerk and the office door. Entry to the interior plant hallway is at the end of the entry hall. Thus public access to the breakroom by virtue of the physical layout is almost open by implicit invitation in the absence of posted signs to the contrary or an effective monitoring system.

Respondent admittedly permitted food vendors entry to the breakroom. One vendor provided food vending machine service by written agreement. Others were simply allowed entry by implicit approval. These include nonemployee Mel's Diner who catered breakfasts, lunches, and dinners there by telephone order; and Sara Feather who for 10 years solicited sales of, and sold to employees at morning breaks, her private brand of cinnamon rolls. Charity sales, largely benefit programs for native American organizations, involving tacos, soup lunches, and peanuts were also very common and undisputedly known to and permitted by Respondent.

Jay Complex Manager Larson, Manager Stauber and Jay Personnel Director Holland all testified that at one time or other that nonemployee food vendors' solicitations and solicitations of employees by employees are permitted in the breakroom, but no other nonemployee access is permitted, i.e., if a noneligible person is caught, they are supposed to be ejected. Such unwelcome visitors are used car salesmen, real estate solicitors, and political candidates. However, Holland admitted that friends and relatives of actively employed persons have free entry to the room to eat there or to wait for employees to end their shift. Furthermore, I credit the testimony of several employee witnesses that former employees and nonemployees also solicited services for automobile repairs, performed them just outside the building on the parking lot, sold and displayed jewelry and knives, all in the presence and observation, or in the case of auto repairs with actual involvement, of supervisors. Disclaimers of awareness by Respondent's managers were unconvincing. I conclude that by virtue of lack of posting and efficient monitoring, the physical layoff of the room, the prevalence of food vending, and employee or employee relative vending going on in there, that the solicitation constituted an open invitation for a variety of nonemployee violations which were not considered on an ad hoc basis too controversial to the managers.

I conclude that the General Counsel has proven that if the Respondent even maintained a consistent no-public access policy, of which I find there was none, that the Respondent applied it in a disparate fashion against nonemployee union representatives by prohibiting their entry into the breakroom. Respondent's own version of its policy alone constitutes an admission of disparity of treatment, i.e., nonemployee food vendors and employee related charitable vendors and solicitations were permitted entry whereas union representatives were not. Furthermore, Respondent failed to adduce evidence

that actual entry into the breakroom by the food vendors instead of restriction to the parking lot served a direct, legitimate, business related interest or accommodation to Respondent rather than an employee convenience which indirectly serves a business interest.

With respect to a union's right of access to an employer's premises by nonemployee representatives for purpose of communicating with employees, the Board's traditional accommodation analysis was rejected by the Supreme Court in *Lechmere, Inc. v. NLRB*, 499 U.S. 918 (1991). However, the Court left intact its statement in *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956), that an employer's right to ''post his property against nonemployee distribution of union literature'' is conditioned upon nondiscriminatory application of that policy. The Board has thereafter applied the ''disparate treatment'' analysis and found violations where a wide variety of commercial and charitable activity unrelated to the operation of the business was permitted but union activity was prohibited. *Great Scot, Inc*., 309 NLRB 548 (1992), and case cited therein; *Richards United Super*, 308 NLRB 201 (1992), citing therein *Davis Supermarkets*, 306 NLRB 97 (1992).[11] Thus the Board has adhered to the ''disparate treatment'' analysis. As the Charging Party points out, the Board has found violation even where the exempted solicitation was that of food vendors' trucks that were permitted into an employee area so that employees could take lunch on the premises and thus reduce the possibility of tardiness. *Knogo Corp*., 262 NLRB 1346, 1362 (1982). In that case, the employees could have had ready access to the food vendor trucks either on the outside parking lot or on the street fronting the breakroom area. As in that case, I find that here, the exception was not sufficiently business related despite the employer's derivation of a potential benefit.

Thus Respondent's exception of food vendors above is sufficient evidence upon which to find an unlawful disparate treatment against union activities of nonemployees directed at access to employees. However, the foregoing facts also disclose a wide range of other profit and charitable entities that were permitted access to the breakroom at Respondent's sufferance. Accordingly, I find Respondent violated Section 8(a)(1) of the Act by selectively and disparately prohibiting access to the Jay plant breakroom by nonemployee union representatives while permitting a variety of nonunion, nonemployee access for charitable and business solicitations of its employees therein, as alleged in paragraph 7 of the complaint.

F. *The Safety and TQM Committees and the ''Electromation'' Issue (complaint pars. 5 and 6)*

The complaint alleges, and the Respondent admits, that it has since January 19, 1993, maintained Safety Committees at both Jay and Southwest City plants which it has supported by establishing policies and agendas. The complaint alleges, and Respondent admits, that since January 19, 1993, it has at its Jay and Southwest City plants maintained Total Quality Management (TQM) Committees regarding the fast food department concerning quality of production which it has supported by establishing policies and agendas. Respondent otherwise formally denied complaint allegations that these committees are labor organizations within the meaning of the Act with which it has bargained or dealt with, with respect to mandatory bargaining subjects, and which it has thus unlawfully dominated or assisted. Respondent affirmatively answered that the committees are: ''periodic meetings of Respondent's supervisory and administrative personnel and Respondent's employees which are developed for, and continue to serve, the essential purpose of promoting and communicating, workplace safety, quality of product, and efficiency . . .'' which have been formed more than 6 months prior to the filing of the underlying unfair labor practice charge. The underlying facts are not disputed. All committees involved were conceived of, created, and assisted by the Respondent well prior to the union activity.

1. The Safety Committees

The Safety Committees were created in 1989 by Respondent as part of its overall safety program. They include employees ''for their input into a safety program.'' The overall safety program included incentives and gifts prior to the limitation period in Section 10(b). The announced purpose of the employee Safety Committee was to assist the Respondent in meeting safety goals it promulgated in a ''corporate statement on safety'' by ''identifying employee and safety risks'' and by communicating ''facets of company health and safety programs.''

The nature and operation of the Safety Committees described hereafter relate to the period on and after January 19, 1993, i.e., within the 10(b) limitation period during which violative conduct may be premised.

Safety Committees function on each of two shifts at both of Respondent's plants. Committee composition selection may vary somewhat between plants, but both follow rules determined by the Respondent's managers. Both committees consist of hourly paid employees representative of all or most departments, a plant nurse, supervisors or personnel department managers, i.e., admitted supervisors as defined by the Act. The voluntary employee membership is selected and solicited by Respondent by the director of personnel either directly or through supervisors. Meetings are held during work hours without loss of pay, and in a supervisor's or manager's office. All minutes or other memoranda are prepared and supplied by Respondent. The employee members are instructed to and, in fact, do solicit their coworkers for specific employee concerns regarding plant safety hazards; which they in turn then present to the full committee at regularly held monthly meetings. The Southwest City members are given worktime to tour their areas to solicit employee concerns prior to each meeting.

The committee meetings are presided over by Respondent's managers or supervisors who ''facilitate'' or direct the course of the discussion. Thereafter, the members, including employee members, cite employee-perceived safety hazards in the plant which they have directly observed or which have been identified to them by coworkers. The nature of the complaint is discussed and explained and its need explicated by the employee members who, on occasions, are questioned by manager participants. Employee members not only identify safety hazards, real or potential, but they also make recommendations. The identified safety hazards and proposals

[11] For a discussion of an employer's posting against the solicitation by nonemployee union representatives directed to customers, see *Loehmann's Plaza*, 316 NLRB 109 (1995); *Riesback Food Markets*, 315 NLRB 940 (1994); *Leslie Homes*, 316 NLRB 123 (1995).

for corrections are thereafter memorialized in a formal minute or memorandum which is forwarded to the appropriate manager for consideration, implementation or rejection, depending upon feasibility. Pursuant to management directive, the Southwest City Safety Committee is limited to a maximum of four safety deficiencies to be selected for correction. The committee then reaches a consensus as to the four most hazardous conditions to be reported.

Many cited problems have been corrected, others were not. The types of safety hazards that employees have complained about through the employee committee members cover a variety of physical plant conditions, including but not limited to slippery floors, slippery catwalks, contaminated air due to presence of some toxins or due to poor ventilation, exposed or uncovered floor drains, placement of either personnel or machinery in such a manner as to cause undue proximity to dangerous tools, e.g., knives, the failure of some employees to wear protective mesh gloves, poor lighting, the condition and placement of fire extinguishers, the need for certain product conveyors to avoid accident, hazardous placement of equipment or supplies, better protective sleeves for sanitation workers, holes in trailer floors, congested internal mobile traffic patterns, frayed electrical wire connections, sidewalk and parking lot conditions, equipment shields, excessively hot or cold ambient air, broken entry doors, accumulation of food scrap, and worker safety related misfeasance or horseplay. There was no discussion of incentives or gifts after January 19, 1993.

Respondent's higher level managers evaluate what they believe to be the severity of the safety complaint and the engineering feasibility for correction. Actual corrections and the status of intended corrections are reported back to the committee, with particular formality at the Jay plant.

The minutes of the safety meetings, however, also disclose some interaction between managerial members and employee members during which employee members identified certain perceived hazards and management representatives responded with counterproposals to correct the perceived hazard. Such interaction was particularly evident at the Jay plant night shift. Superintendent Terry Graham actively proffered counterproposals and suggestions to alleviate the identified hazard. There were also occasions when management representatives explained why the perceived problem was in reality not a real hazard and thus, in effect, rejected the employee proposals for correction at the committee meeting level. There were also occasions when management representatives explained that the problem was already being remedied by a predecided course of action. This local proposal and counterproposal and resulting resolution also occurred at the Jay plant committee level so that, in effect, a consensus of real problems was achieved upon which higher management would consider, much as a consensus was reached at Southwest City as to the four high priority hazards.

Upper management either rejected the committee's proposals or acted upon them without direct interaction with the committee per se, except for individual consultation with a managerial safety personnel participant. However, in one sense, there was some interaction or reaction on a formal level because the minutes reveal that employees complained that ongoing preidentified problems had not been remedied or not sufficiently remedied as promised. These reiterations were memorialized in the subsequent minutes which were duly forwarded to higher management.

Some of the safety problems proposed for correction that were documented as having been accepted by Respondent, which in turn were corrected or correction-attempted, related to floor drain hole covers, electrical wiring grounding, a wide variety of certain equipment corrections or modifications, air toxins or pollution, equipment repairs, neatness and cleanliness of floors, sidewalk, parking lot congestion, snow removal, fire drills, installation of windows, increased illumination, correction of identified unsafe employee behavior or nonfeasance in safe work practices, installation of a conveyor line safety device, and slippery floors due to scrap product. There were other areas of admitted safety correction of an unidentified nature which occurred in response to the Safety Committees' proposals.

2. The TQM Committees

a. *Jay plant*

The genesis of the Total Quality Management, i.e., TQM concept, was the Respondent's principal customer, KFC, which had urged its adoption by Respondent and monitored its progress. The Jay City TQM commenced as a managerial group in 1992. By late fall of that year, Jay plant employees were folded into the committee membership for the purpose of, as testified to by Jay Complex Manager Larson, providing information upon which Respondent would make certain operational decisions related to efficiency and product quality.

(1) Jay Fast Food Committee

Employee involvement actually occurred by incorporation of employee members into a subcommittee known as the Fast Food Committee, herein called FFC. It was composed of employees and managers. Four employees were selected by Plant Manager Brent Butler from the day-shift four tables in the fast food department which incorporates 6 or 7 saws and support personnel and a totality of at least 10 employees per table. Butler's selection was approved by Larson. Joining those employees on the Fast Food Committee were Superintendent Wayne Dunham, Sales Manager Jon Thompson, Fast Food Supervisor Ron Rogers and Supervisor-Trainee Jamie Murphy. Subsequent meetings of that committee were held either in the superintendent's office or in the plant conference room during working hours, at no loss of pay for time attended by employees.

Prior to the FFC meetings within the statutory limitation period, the managerial TQM had discussed and devised a potential employee bonus plan, about which Larson communicated by memo with the FFC. These communications continued into the limitation period. On February 3, 1993, Larson and Butler jointly authored a memorandum to the FFC, self-purportedly responding to a prior FFC request of Respondent for a ''basic structure for an incentive program'' in the fast food department. Attached thereto was a proposed incentive structure inclusive of a weekly bonus pool for certain fast food department employees. The memorandum indicated that safety would be factored in and solicited ideas from the FFC as to how it could be done, i.e., the stated object was that the bonus pool would be reduced in proportion to a rise in plant accident costs. The FFC was advised that

it would be questioned further and was instructed to study the proposal and assist Respondent to formulate a policy to be effective March 1993. The FFC was also advised that further ''refinements'' would be sought from it thereafter, albeit management would ''retain the final authority on all policy and changes.''

The FFC responded via a memo from Butler to Larson dated February 16, wherein the results of its February 10 meeting discussion were delineated and a variety of proposed options were conveyed, including, inter alia, method of bonus money disbursement, eligibility for bonuses, and three options relative to the safety factor. With respect to safety, the FFC was reported by Butler to be looking for ''direction from management,'' but he recommended the second option proposed by the FFC, i.e., certain percentage deductions for recordable and lost time accidents. Larson responded to Butler by memorandum dated February 19, advising that Respondent had considered the FFC safety factor proposals and had, in consequence, decided to adopt a formula for set dollar amount deductions from the bonus pool for every accident day of lost time.

On April 8, the FFC met to discuss ways of successfully absorbing an anticipated increase in summer production demand. The minutes, prepared by Respondent, reflect that three options were discussed, but a ''consensus'' was reached to set a maximum 9- to 9-1/2-hour workday because it was concluded that a longer day would unduly burden the employees. Employee member Sandy Becton is noted therein as having made a suggestion as to saw realignment to increase productivity, which was agreed to by the FFC as feasible and to be presented by Butler for approval by the appropriate authority. On May 21, the FFC met and general employee questions were proffered by employee members with respect to aspects of the incentive plan, and suggestions by employee members were proffered as to job time measurements and employee malingering.

Robert Stauber became plant manager at the Jay plant on June 1, 1993, and attended the July 8 FFC meeting for the first time as plant manager. He had attended earlier meetings as a quality assurance manager. Stauber testified that at prior meetings employee members had complained about tardiness, absenteeism, and excessive breaks taken by other employees which impacted adversely upon other employees bonuses by decreased efficiency. Stauber raised those topics at the July 8 meeting. He thereupon led a discussion of all employees soliciting in the process proposals of the employee members. Upon reaching an agreed-upon consensus, the FFC agreed to a statement of Respondent policy, i.e., rules relating to tardiness, unexcused absence from work stations and ''courtesy'' breaks. After subsequent consultation with Larson, Stauber made a revision but thereafter effectuated the policy. After July 8, The FFC was disbanded and never reassembled.

(2) Jay Plant Corrective Action Team

At the April 27 managerial TQM meeting, the idea of Corrective Action Teams was discussed by Stauber, i.e., standing teams consisting of representatives of first processing, second processing, sanitation ''with 1 superintendent and some hourly people'' to resolve ''repetitive problems.'' They discussed the idea of a nonsupervisory facilitator so that employee members would ''open up and talk.'' On June 15, Stauber authored a Corrective Action Team statement of policy. It set forth that the Corrective Action Team (CAT) would provide for an interchange of ideas between all members, suggestions from all members, identification and analysis of recurring problems and causes, and recommendations of preventative actions. Those recommendations were to be implemented upon decision of the appropriate management team members, in turn to be reviewed by another managerial committee known as the Design Team which reviewed and approved the CAT minutes. Finally, the plant's statistical process control, i.e., error monitoring and correction procedure, was itself to be monitored by the CATS and the appropriate management team member.

By written memo of September 14 and 22, Stauber solicited volunteer membership from ''all members of the Fast Food Department.'' He stated the CAT purpose was the solicitation of ideas to reduce improperly cut product which caused rework, to reduce other production floor problems and high product temperature (i.e., it was critical to maintain low chicken product temperature) and to improve overall product quality. A variety of employees, including former members of the FFC, thereafter participated in the Fast Food CAT along with Managers Stauber, Dunham, Rogers, Supervisor-Trainee Mundy, Quality Control Manager David Jackson, and Quality Control Supervisor Eric Wrede. The meetings preceded the shift start time, but employee members were paid their regular rate of pay. Meetings were held in the Jay plant conference room.

A CAT meeting was first held on September 16 and was attended by Stauber, Rogers, and one employee. The amount of miscut parts was discussed. The employee offered ideas as to how to involve employee interest in the corrective action effort and she relayed the opinions of her coworkers as to their interests in it. She offered ideas as to improved employee training. They agreed to meet again in 1 week. Thereafter, meetings were held on September 23, October 6, 20, November 4, 11, December 2, 9, and 16, 1993, and March 31, 1994. There is no evidence of any meetings thereafter. Stauber was unaware of any.

The minutes of these meetings reflect a wide range of proposals resulting from CAT members' discussion. It is not entirely clear as to just how the employee members participated in these discussions. Thus there is an absence of what kind of employee-manager interaction at this level, if any, other than the offering and discussion of efficiency and product quality ideas. At the October 6 meeting, Stauber informed the group of unspecified ''ground rules'' for discussion.'' ''Brainstorming'' occurred thereafter, according to the minutes. Quality control manager Jackson was the ''facilitator.'' The recommendations set forth in the minutes consisted of suggestions related to improved efficiency of operations and quality of product in accord with the stated objective. They included, inter alia, increased employee training, proper equipment maintenance, punishment for employees prone to work errors, reduction of employee horseplay, length of employee breaks, posting of customer complaints, proper adjustment of saw blades, proper cutting instructions (to which response was subsequently made in the form of copies of correct cuts and procedures), improvements in the quality of the product itself, more information regarding customer specifications, and development of a method of equalizing work between tables, i.e., that all tables cut to the same specifications.

As the meetings progressed, observations as to improvements in cutting quality were noted in the minutes. With respect to employee excessive breaks, it was simply noted that the members themselves would encourage coworkers as to proper conduct. Unlike the experience with the FFC, there is no evidence that Respondent or its managers implemented any recommendations of the CAT with respect to employee discipline or with respect to the subject of tardiness, absence or excessive breaks. A brochure was developed by Stauber which descriptively and graphically explained proper product cutting.

b. *Southwest City TQM committees*

As with the Jay plant, KFC was the instigating factor for the formation of the TQM process at the Southwest City plant in 1992. The original Southwest City TQM Committee commenced life as a strictly managerial entity, and it evolved under guidance from KFC, which periodically audited its progress. In neither plant did KFC demand employee involvement. From that committee, there evolved a ''master design team,'' or ''steering committee'' as it was more recently characterized, which remained composed of managerial persons. At the Southwest City version of the TQM concept, an employee participation committee similarly evolved and was active by at least February 1993. Unlike the Jay employee participation committees, the Southwest City committees were not given any specific name nor were they constituted as a standing or ongoing committee. Rather, the Southwest City employee participation committees were created for the purpose of implementing corrective action in the same manner as at the Jay plant but, however, only for specific problems identified by management. Each Southwest City employee participation Corrective Action Team's life span lasted no more than several meetings. The format or procedure of the corrective action process was determined and promulgated by the plant manager. He also devised a preprinted form or outline of procedure which the ''facilitator'' would follow and make entries in the appropriate spaces. The facilitator or committee was appointed by the plant manager, his superior, or a managerial member of the design team. The facilitator was held responsible for the development of the proposed corrective action and was obliged to report it back to the plant manager or the design team. For each committee, one employee was selected from each of the four tables. Employee Michele Richison testified that she was selected by her coworkers at her table to be their ''captain,'' i.e., representative at committee meeting. As such, she attended three to five meetings between February 1993 to March 1994 which were also attended by superintendents, maintenance supervisors, and quality control persons. They met in the supervisor's office during worktime without loss of pay. Before each meeting, Richison met with her coworkers to ascertain the problem and solicited their suggestions. At the meetings, she exchanged these ideas with other ''captains.''

Not all problems were subject to corrective action, nor did the corrective action always involve employee participation. To be subject to the corrective action process, the problem had to be persistent and it had to be related to plant production efficiency and product quality. Employee committee participation was limited to such problems that were pertinent to the employees' job function and where the employee would have specific knowledge of the job and, accordingly, of the problem. In practice, the ad hoc Corrective Action Committees normally entailed employee participation. In fact, as explained by personnel director Malcom Clark, employee involvement was one of the purposes for the creation of these committees.

The Corrective Action Teams were designed and instructed to discuss openly the nature of the problem and to discuss possible solutions and select, by vote, the proposed solution. There is no evidence of weighting of votes. The proposed corrective action was thereafter communicated to ''everyone who may be directly or indirectly affected,'' by verbal or written instructions. Responsibility for recordation of minutes, communication, and evaluation of corrective action implementation was placed on the facilitator, i.e., a nonemployee.

One prime example of employee involvement in the Corrective Action Committee process cited by the General Counsel related to the mid-April 1973 development and institution of KFC's new Colonel's Rotisserie Gold (CRG) process which involved implementation of new, high-tech, high-speed marinade injection machines. The Corrective Action Committee consisted of 10 persons including the plant manager and four employees. ''Input'' was solicited and obtained from the employee members as to machine location. However, the entire process was chiefly directed by representatives of KFC who were present to answer employee questions as to KFC's diagram for employee and machine placement. Plant manager Bridges described the entire process as ''educational.'' However, minutes dated June 20 reveal that the committee discussed and proposed changes which were thereafter accepted after ''lengthy discussion'' between the plant manager, ''corporate engineering'' and two other managers. These changes involved modifications in the design of the Foodcraft department machine positioning, intersecting of conveyors, and scale relocation. The purpose of the changes was to facilitate product flow and to allow for the KFC-CRG equipment placement. Another minor change to the KFC proposed plan was made upon the committee's suggestion, i.e., the relocation of the deboning table by a few feet. The proposed changes were implemented or attempted by Respondent.

The General Counsel adduced evidence of one other incident. Employee Richison testified that at the first meeting she attended, Superintendent Rockrohr had announced the object problem as how to keep the saw running properly. It was then discussed whether the saw should be shut down whenever a problem arose in order to maintain good product quality. Employees suggested that maintenance to the saw might be accelerated without having to resort to the public address page system. In consequence thereafter, Respondent installed a switch-activated red light maintenance signal at the saw table in order to summon immediately maintenance personnel. The maintenance problems discussed by employees were dull saw blades and machine malfunctions.

3. Analysis and conclusion—Safety and TQM Committees

Both the General Counsel and Respondent have centered their arguments around the Board's widely noted and discussed decisions in *Electromation, Inc.*, 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994); and *E. I. Du*

Pont & Co., 311 NLRB 893 (1993), and numerous cases cited and analyzed therein.

The facts in this case with respect to assistance and domination are undisputed. If the employee participation committees herein constitute labor organizations, then they would most certainly constitute organizations dominated and assisted by Respondent. These entities were created, formed, funded, directed, and constituted by Respondent. Their continuance is at the sufferance of Respondent. Their employee membership depends on the method chosen by Respondent, i.e., direct appointment by Respondent as in the Safety Committees and Jay TQM Committees or by election of coworkers at the Southwest City correction ad hoc committees. Their functioning format and agenda are determined by Respondent.

The real issues here are whether these employee participation teams are for all effective purposes de facto labor organizations. As discussed in the *Electromation* case, the concept of ''labor organization'' as contemplated by the Act is extremely broad and includes very loose, informal, unstructured, and irregular meeting groups. Such a loose organization will meet the statutory definition if:

> (1) employees participate, (2) the organization exists, at least in part, for the purpose of ''dealing with'' employers, and (3) these dealings concern ''conditions of work'' or concern other statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment.

The Board added:

> Further, if the organization has as a purpose the representation of employees, it meets the definition of ''employee representation committee or plan'' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. [*Electromation, Inc*., supra 994.]

The facts reveal that all the employee participation committees herein were designed by the Respondent to be representational, i.e., to reflect a cross-section of employees in the departments from which they were selected. With respect to both safety and Jay Fast Food Committees, the employee members solicited the opinions, conclusions, desires and/or needs of coworkers and relayed them to the employer agents on the committees and, in turn, by various methods of minutes or reports to higher management on reaching a consensus.

Whether the Safety and all TQM Committees ''dealt with'' the Respondent concerning work conditions is where the difficulty of analysis begins.

a. *Safety committees*

The Board held in the *E. I. Du Pont*, supra, that employee health and safety were conditions of work which are mandatory subject of bargaining. The Board noted that a committee might exist solely for the purpose of imparting information to the employer and thus no ''dealing'' would be involved. Similarly, a ''brainstorming'' session does not constitute ''dealing.'' The Board stated in *Du Pont* that if the committee makes no proposals to the employer who, in turn, simply gathers information and ''does what it wishes with such information,'' there is no dealing and therefore no labor organization status. *E. I. Du Pont*, supra, at 894 and 895. Respondent argues that this is the instant situation, i.e., employee members simply act as observers and monitors of potential hazards and identify them. Member Devaney noted in his concurring opinion in footnote 3, page 898, that he did not view the Board's decision as a broad ban ''on an employer's bringing employees together with managers in other circumstances, to tackle the nuts and bolts of safety issues or any of the myriad technical decisions involved in maintaining a safe, efficient physical plant and in quality control.'' In *Electromation*, Member Devaney, in concurrence, stated that he, however, would be ''inclined to interpret 'dealing with' as involving a process more bilateral in nature than soliciting and/or accepting employee suggestions or ideas'' (supra at 1002).

The line drawn between where reporting safety hazard information and an employer doing with it what it wishes and where employees report and discuss with managers safety related working conditions and make proposals can be indistinct and troublesome. In *E. I. Du Pont*, the Board suggests that it may be lawful for employee committees to report safety problems. However, to do so, they may make decisions as to what is a safety problem that affects coworkers and the very reporting of such might very well, by the very mechanism of reporting safety hazards, imply a request for redress regardless of a formal, explicit recommendation for action. Furthermore, for what purpose does an employer solicit these ideas if not for consideration to accept or reject. In *Electromation*, at 994, fn. 21, supra, the Board stated:

> . . . we view ''dealing with'' as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5) coupled with real or apparent consideration of those proposals by management.

In the *E. I. Du Pont* case, the Board, at page 894, citing the Supreme Court's holding in *NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959), again made the distinction that the term ''dealing with'' is not limited to the definition of ''bargain with'' but rather involves a ''bilateral mechanism'' which ''entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.'' However, the Board further stated that isolated instances of ''ad hoc'' response thereto by managerial acceptance or rejection by word or deed do not effectuate the necessary element of dealing.

In the *E. I Du Pont* case, the Board found a pattern of dealing concerning safety in working conditions whereby the employee committee members made proposals to management in different ways. Sometimes proposals were made to management representatives outside of the committee which were responded to and corrected. At other times, the committee discussed proposals with management representatives within the committee proceedings. The Board found that the employee and employer representatives ''interacted'' under the rules of consensus decisionmaking whereby under man-

agement's procedural definition, all members of the group ''were willing to accept a decision.'' There, the management representatives discussed proposals with employee representatives and had the power to reject any proposal, which the Board found constituted ''dealing'' just as if it had occurred between the committee as a whole and outside the committee management,

Respondent argues that the core purpose of both Safety and TQM Committees is the sharing, i.e., input of information, and that in only isolated instances had ''the relations even approached a proposal and response made.'' Therefore, Respondent argues that none of the committees were labor organizations.

With respect to the Safety Committees at both plants, the facts disclose the contrary to that suggested by Respondent. There, a regular pattern and practice existed whereby employee committee members in a representational capacity sought out, by direct observation and by consultation with coworkers, the identification of safety hazards for which employees desired correction. Furthermore, like the *E. I. Du Pont* committees, by a consensus process, proposals for correction were regularly reported to higher management which, upon consideration, accepted proposals and modified some plant working conditions and rejected other proposals. All proposals affected the physical safety and health needs of all employees working in those identified areas. As in the *E. I. Du Pont* case, the employee members frequently interacted with management members at committee meetings by discussing in depth the nature of the employee safety complaint. The management members responded by agreement or by suggesting alternative courses of action or by explaining why the perceived problem was in reality not a problem

I conclude that under the definition of dealing set forth in the *E. I. Du Pont* case regarding safety related working conditions, the employee participation Safety Committee herein exceeded the function of safety hazard identifiers and hazard reporting automatons. Rather, they acted as representational presenters of safety complaints and recommendation makers whose proposals were considered and accepted or rejected by management either at an interactive committee level or upon report from the committee. By fulfilling such function, I find that the Safety Committees of both plants constituted the kind of representational committee that constitutes a labor organization under the definition of the Act. By dominating, interfering with the operation of, and assisting these employee representational Safety Committees, I find that Respondent violated Section 8(a)(1) and (2) of the Act.

With respect to the Jay plant TQM/Fast Food Committee, the employee members were representative of each table grouping of employees. Within the limitation period, the committee discussed and made proposals solicited by Respondent with respect to the formulation and implementation of an incentive bonus pay program, clearly a mandatory bargaining subject. The Respondent accepted some of the committee's proposal and guided itself by others in formulating the bonus plan. This was an ongoing interaction and was not limited to an isolated meeting. At one point, committee proposals were accepted regarding hours of work. Furthermore, the Fast Food Committee continued on through the summer of 1993, before it was disbanded, to discuss and make proposals with respect to employee discipline, attendance and punctuality problems and employee courtesy breaks. On recommendations based in large part on employee member complaints, the plant manager issued a set of rules that clearly affected these conditions of employment and mandatory bargaining subjects. Thus the Fast Food Committee, during its existence from early 1993 through summer of 1993, effectively constituted a representational employee committee, in effect a labor organization, which was unlawfully dominated, interfered with in operation and administration, and rendered unlawful assistance to by Respondent in violation of Section 8(a)(1) and (2) of the Act.

With respect to the Jay plant Corrective Action Team and the Southwest City ad hoc employee participation corrective action groups, I come to a contrary conclusion and find that they came within that area of informational mechanism which is limited to questions of quality of product and efficiency of operation such as found to be lawful in *Sears, Roebuck & Co*., 247 NLRB 230 (1985), and excluded from consideration by the Board in the *Electromation* decision in page 997, footnote 28. In the *Sears* case, recommendations as to efficiency might impact working conditions, but the immediate prime purpose was the employee informational input to ''help resolve managerial problems'' and to remedy management needs. Although how to cut a bird properly affects the actual way a worker is expected to perform his task, the prime purpose is the quality of product and not the needs or convenience of employees. The Respondent herein, in effect, solicited information from employees so that management would more effectively make managerial decisions, e.g., where machines should be placed for better product flow, how to accomplish fewer cutting errors and how to adhere more frequently to customer specifications, matters which would have been of relative indifference to employees in absence of management informational solicitation. There is also an absence of the kind of employee-manager interaction in the Corrective Action Teams that occurred in the Safety Committees where proposals and counterproposals were made to satisfy employee concerns, needs or desires.

I do not find it to be a controlling factor that the *Sears* case involved a rotational selection of employee representatives whereby all employees participated. Clearly, not all served on the same time, and efficiency recommendations made by the acting employee representatives in *Sears* impacted upon working conditions of employees beyond that representative.

Furthermore, the Jay Corrective Action Committee and Southwest City ad hoc committees did not regularly or by habit deal with conditions of employment or with mandatory subjects of bargaining. There were isolated recommendations by the Jay committee for Respondent action relative to employee discipline or employee breaks, but they were referred back to employees for self-correction which effectively signaled that this was not a matter directly related to efficiency or quality of product

To conclude that any managerial decision directly related to efficiency of operation and quality of product which might somehow impact the production employee and involve physical working conditions would preclude by definition any employee participating committee that failed to meet the strictures of an independent labor organization as defined by the Act because all managerial decisions can be construed as ultimately affecting the employee in some respect, e.g., where and how he performs his tasks. Clearly, the Board

went out of its way in *Electromation* and in *E. I. Du Pont* to disclaim such intent.

Accordingly, I find the complaint allegations with respect to the Jay Corrective Action Committees and the Southwest City employee participating Corrective Action Teams to be unmeritorious.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, at all materials times, the Plant Safety Committees at Respondent's Jay, Oklahoma, and Southwest City, Missouri, facilities have been and are labor organizations within the meaning of Section 2(5) of the Act.

3. As found above from early 1993 until its disbanding in the summer of 1993, the Fast Food Committee at Respondent's Jay, Oklahoma, facility was a labor organization within the meaning of Section 2(5) of the Act.

4. As found above, Respondent committed unfair labor practices which I find affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully removed Southwest City, Missouri employee Ronnie Rice from the box room lid machine job in October 1993 and assigned him to a lower paying job, and having found that it unlawfully reduced the work hours opportunities of its Southwest City, Missouri employee Andrea Coffee, I recommend that Respondent be ordered to offer Rice immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make him and Andrea Coffee whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which they would have earned absent the discrimination against them, with backpay and interest computed in accordance wit the formula set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent discriminatorily and unlawfully prohibited the Union from access to its Jay, Oklahoma facility employee breakroom, I recommend that Respondent be ordered to permit access by the Union's representatives to the same extent and manner permitted other nonemployee visitors and solicitors.

Having found that Respondent unlawfully dominated, supported, and assisted the Plant Safety Committees at its Jay, Oklahoma, and Southwest City, Missouri facilities, I recommend that it be ordered to disestablish and cease all support to them. Inasmuch as the Jay, Oklahoma plant Fast Food Committee no longer exists, a disestablishment order is unnecessary.

[Recommended Order omitted from publication.]